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VOLUME XXX NUMBER 4

Massachusetts Law Quarterly

DECEMBER, 1945

MESSAGE FROM THE PRESIDENT OF THE MASSACHUSETTS BAR ASSOCIATION

CONTENTS

ISSUED BY THE MASSACHUSETTS BAR ASSOCIATION, 53 STATE ST., BOSTON, MASS.

MESSAGE FROM THE PRESIDENT

To Members of the Massachusetts Bar Association

The Voluntary Contributions

The response of our members to the appeal for voluntary payments of five dollars to be added to their January dues bills, to help out the situation caused by the absence of many of our members in the armed services, was most gratifying. Over $1400 was received. It should be made clear to the members that this was an expedient resorted to to meet an unusual situation and that there is no thought of resorting to it to meet current deficits caused by living beyond the limitations of our budget. I want to express my gratitude for your generous response.

The Post-War Institute

The Post-War Institute, with its lecture course and placement service for returning servicemen, has succeeded beyond our expectations. The lecture course has been given twice in Boston — in October with an enrollment of 61 and in January with an enrollment of 164, and once in Worcester with an enrollment of 40. The lectures will be given in Springfield beginning March 18, and we are informed that over 50 have already indicated an intention to attend. I hope that returned servicemen from Pittsfield and other Western cities and towns may find it feasible to attend the Springfield course, for it will be impracticable for the score or so of lecturers to give their lectures at more distant places. The next session in Boston will begin March 25.

We have not had the desired response from the county bar associations to our request that they organize local committees to assist Joseph Collins, Placement Director, whose office is at 18 Tremont Street, Boston, in finding openings for men in their several communities. We are particularly anxious to help veterans set up in practice outside of metropolitan Boston. This past week, for example, we had a veteran who wants to practice somewhere on the Cape. If your local Association has not yet organized a committee for this patriotic service to our fighting men, please do so at once and report to Joe Collins. You may in that way furnish the necessary point of contact to get a good man in a good office.

Plans for the Swampscott Meeting — June 7 and 8, 1946

The New Ocean House, Swampscott, has been engaged for the weekend of June 7 and 8 for the Massachusetts Lawyers'

Institute and annual meeting of the Association. The Massachusetts Association of City Solicitors and Town Counsel will meet with us, as last year. With the wartime travel restrictions lifted, we anticipate the largest gathering since the establishment of this enterprise five years ago.

Integration of the Bar

There have been now sent to all affiliated bar associations pamphlets containing the interim report of the Committee of Twenty-Five on Integration of the Bar, for distribution throughout their membership. We have requested all associations to adopt some means of getting an expression of opinion from their members as to whether they favor or oppose the plan in principle. Most of the associations have already made plans to do so. The motion adopted at Swampscott two years ago, and reaffirmed last year, directed this Committee to confer with the Supreme Judicial Court on the subject. Before this is done, we want to know whether the general sentiment of the Bar is for or against it. The Norfolk Association has been a pioneer for it and has recently voted in favor of placing the plan before the Court for adoption. How do the members of your Association feel about it?

Edward O. Proctor,
President

February 13, 1946.

Public Document

No. 144

December, 1945

TWENTY-FIRST REPORT
Judicial Council of Massachusetts

FOR TABLES OF CONTENTS OF PREVIOUS REPORTS 1924 TO 1939 AND A LIST OF REPORTS OF COMMITTEES, COMMISSIONS AND OTHER MATERIAL RELATING TO THE HISTORY OF THE JUDICIAL SYSTEM SINCE 1780, SEE 15th. REPORT (1939) 93-105

FOR THE HISTORY OF THE JUDICIAL COUNCIL AND ITS RECOMMENDATIONS AND RESULTS OF ITS WORK, 1924-38, SEE 14th. REPORT (1938) 43-73

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Publication of this Document Approved by the Commission on Administration and Finance
3400-10-45-16921

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The Commonwealth of Massachusetts

DECEMBER, 1945

TO HIS EXCELLENCY, MAURICE J. TOBIN,

Governor of Massachusetts.

In accordance with the provisions of section 34B of chapter 221 of the General Laws (Ter. Ed.) we have the honor to transmit the twenty-first annual report of the Judicial Council.

FRANK J. DONAHUE, *Chairman.*
NATHAN P. AVERY, *Vice-Chairman.*
LOUIS S. COX,
JOHN E. FENTON,
JOHN C. LEGGAT,
WILFRED BOLSTER,
FRANK L. RILEY,
FREDERIC J. MULDOON,
SAMUEL P. SEARS.
WILFRED J. PAQUET,

ACTS OF 1924, CHAPTER 244

As amended by St. 1927, c. 923, and St. 1930, c. 142

Now appearing as G. L. (Ter. Ed.) Ch. 221, §§ 34A-34C

AN ACT PROVIDING FOR THE ESTABLISHMENT OF A JUDICIAL COUNCIL TO MAKE A CONTINUOUS STUDY OF THE ORGANIZATION, PROCEDURE AND PRACTICE OF THE COURTS.

Be it enacted, etc., as follows:

Chapter two hundred and twenty-one of the General Laws is hereby amended by inserting after section thirty-four, under the heading "Judicial Council," the following three new sections—*Section 34A.* There shall be a judicial council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

Section 34B. The judicial council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

Section 34C. No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof, shall receive from the commonwealth a salary of thirty-five hundred dollars.

MEMBERS OF THE COUNCIL

FRANK J. DONAHUE of Boston, *Chairman*
NATHAN P. AVERY of Holyoke, *Vice-chairman*

LOUIS S. COX of Lawrence
JOHN E. FENTON of Lawrence
JOHN C. LEGGAT of Lowell
WILFRED BOLSTER of Wellesley
FRANK L. RILEY of Worcester
FREDERIC J. MULDOON of Winthrop
SAMUEL P. SEARS of Newton
WILFRED J. PAQUET of Watertown

FRANK W. GRINNELL, *Secretary*, 60 State St. Boston

TWENTY-FIRST REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS

To His Excellency
MAURICE J. TOBIN
Governor of Massachusetts

The Judicial Council was created by St. 1924, Chapter 244 (*See copy printed on opposite page*), "for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, the work accomplished and the results produced by that system and its various parts."*

Since the last report, the term of Asa S. Allen, as a member of the Council, expired in July of this year, and Wilfred J. Paquet of Watertown was appointed by Your Excellency to succeed him.

RECOMMENDATIONS ADOPTED IN 1945

The Judicial Council again expresses its appreciation of the continued helpful and cooperative spirit in which its recommendations were received by the legislature, the legislative committees, the Bar Association committees, and by Your Excellency in the joint effort of all to improve the administration of justice. During the last session of the legislature, thirteen recommendations of the Council were adopted by the legislature (in addition to various negative recommendations on matters referred to the Council by the Legislature which were followed).

The recommendations adopted now appear in the statute book as follows:

Chapter 428: Providing for emergency jurors in capital cases and for waiver of a full jury in case of death or illness or other incapacity of one or two jurors. The reason for this chapter was explained in full in the 20th. Report of the Council, p. 7.

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* In 1925, the legislature also submitted the following request to the council.

1925 RESOLVES, CHAPTER 27

"Resolved, That the judicial council is hereby requested to investigate ways and means for expediting the trial of cases and relieving congestion in the dockets of the Superior Court, and, among other things, the advisability of increasing or of wholly removing the ad damnum limits of district court jurisdiction in civil cases; measures for discouraging frivolous appeals; measures for requiring parties to frame issues in advance of trial by greater specification in the declaration of what the plaintiff in good faith claims and greater specification in the answer of what the defendant admits or in good faith denies, with suitable penalties for frivolous or unfounded allegations and denials; ways and means for encouraging, so far as consistent with constitutional rights, trials without jury, including specifically an inquiry into the operation of the laws of Connecticut and Maryland relative to the waiver of jury trials in criminal cases; and any other ways and means that may appear feasible to said council for improving and modernizing court procedure and practice so that, consistently with the ends of justice, the proverbial delays of the law and attendant expense, both to litigants and the general public, may be minimized. (Approved April 24, 1925)."

Chapter 582: Inserting a new chapter in the general laws as to declaratory procedure and removing the previous limitation of such procedure to the interpretation of written instruments. The reasons for this chapter are also explained at length in the 20th. Report of the Council, p. 15. This act should enable the bar of Massachusetts and their clients to secure the settlement of many controversies more promptly and with less risk of loss, expense, and friction than has been possible hitherto. The procedure is used to an increasing extent in other jurisdictions and the history and precedents in regard to it are collected for convenient reference in two volumes on declaratory judgments by Borchard and by Anderson. (See also M. L. Q. Nov. 1945.)

Chapter 604: This law, adopted without change in the form recommended by the Council and explained at length in the 20th. Report, should reduce the chances of hardship in connection with suits for deficiencies after mortgage forclosures by providing a short statute of limitations of two years from the date of a foreclosure sale and a requirement of notice by registered mail at least twenty-one days before a foreclosure sale to the latest known address of any person whom the mortgagee intends to hold for a deficiency, as a condition precedent to a suit for the deficiency.

Chapter 578: Regulating procedure on motions for a new trial on the ground of inadequate damages.

Chapter 570: Limiting the effect of a record of death as evidence in connection with questions of liability and placing such records on the same basis as hospital records.

Chapter 349: Relating to practice in the Probate Courts as to authority to carry on business of a deceased person.

Chapter 590: Providing for procedure in the district court for the protection of Massachusetts citizens against damage caused by non-resident motor cars.

Chapter 311: Adopting in substance a provision of the "uniform veterans' guardianship act" providing for control by the Federal Veterans' Administration of veterans committed to hospitals for mental disease.

Chapter 373: Providing for consolidation of cases arising out of the same facts for trial under St. 1943, Chapter 369, by motion rather than by petition.

Chapter 323: Extending the authority of the Supreme Judicial Court in regard to the destruction of old documents in clerk's offices of the various courts.

Chapter 465: Bringing the recorder of the land court within the provisions of G. L. Chapter 211, Section 4.

Chapter 522: Increasing the amount to be paid for postage on land court notices to cover the increase in the postage rates.

The reasons for all of these new statutes can be readily found in the 20th Report (public document No. 144), reprinted in the Massachusetts Law Quarterly for December, 1944.

Exceptions in Suits in Equity and in Proceedings in Probate Courts, Discussion of Chapters 469 and 530 the Acts of 1945, The Effective Date of Which is March 1, 1946

As appears on the opening page of this report one of the specifically expressed purposes for which the Judicial Council was created was "the continuous study of the rules and methods of practice and procedure of the judicial system . . . and the results produced." In the performance of these functions the Council has considered chapter 469, providing for exceptions in proceedings in the probate courts, and chapter 530 relating to exceptions in equity. We understand that the purpose of these acts was to reduce the volume and expense of records in appellate proceedings.

We appreciate some of the difficulties which are faced by the bar and their clients in connection with appeals in securing a review by the Supreme Judicial Court on some questions without undue expense for stenographic and printing costs, which many litigants cannot afford. The two chapters referred to are as follows: Chapter 469 amends section 9 of chapter 215 (relative to probate courts) by adding:

"In lieu of an appeal a person aggrieved may allege exceptions as provided in Section 113 of Chapter 231."

Chapter 530 amends Chapter 231 by inserting a new section 96A:

Hitherto we have had only appeals in the probate courts.

"In suits in equity a person aggrieved by an opinion, ruling, direction or judgment of a single justice of the Supreme Judicial Court or Superior Court or of the Land Court may in lieu of claiming an appeal as provided in Section 96 allege exceptions as provided in Section 113."

It should be noted that Sections 113 and 144 of Chapter 231 *already provide for exceptions* in equity suits so that the purpose and effect of Chapter 530 are not clear.

Representative bar association committees composed of active and experienced practitioners and other individual lawyers and judges are opposed to these two statutes, of opinion that they will confuse rather than help the bench and bar, and, consequently, in favor either of repealing the statutes before they take effect on March 1, 1946, or postponing their effective date in order to allow time for

study with the view to the preparation of some substitute plan which would be a more helpful and less confusing method of meeting such needs of justice as may appear as a result of such study.

We have been informed by the correspondence of the clerk of the Circuit Court of Appeals of the 4th Federal Circuit that, under a Federal Court practice relative to records (entirely different from chapters 469 and 530) in the 4th Federal Circuit, in 611 cases, $184,488.50 in printing costs were saved and 112,959 unnecessary pages of record were eliminated; and that this practice has been adopted in the 2nd, 3rd and 8th Circuits, in the Court of Appeals for the District of Columbia, and in the Maryland and Wisconsin state practice and that it is under consideration in Pennsylvania and West Virginia. The matter is also being studied in New York as appears in the 11th. Report of the New York Judicial Council. We believe a practice which produces such results for the relief both of the court and the litigants deserves study.

Under these circumstances, and in view of the uncertainty in the minds of members of the bench and bar as to the practical effect of these two chapters on practice throughout the entire commonwealth in courts of equity and in all the probate courts, we respectfully suggest that the effective date of these two statutes be postponed in order to give time for study of procedure affecting statewide practice.

Reports Requested by the Legislature of 1945

This year the "subject matter" of 17 bills pending before the legislature were referred to the Council with a request for a report. On these matters we report as follows:

these matters we report *beginning on page 11*:

Newton	595	334	143	114	4	34	121	24	2	0	161	492	2,073	40	347	1,532	27	2	117
Fitchburg	168	84	32	50	2	10	22	2	1	0	48	126	1,350	14	1,044	124	31	1	59
Norfolk, Northern	516	331	112	65	8	25	102	21	0	0	195	369	845	12	252	364	35	0	83
Brighton	315	47	68	199	1	22	55	19	0	0	296	599	2,029	43	921	770	21	7	51
Franklin, Greenfield	105	56	22	26	1	2	11	1	1	0	16	284	761	5	248	245	45	14	35
Worcester, 1st Southern	191	110	43	35	3	24	36	16	0	0	26	358	941	17	370	354	43	10	45
Brookline	721	422	184	108	7	29	152	16	2	0	249	339	1,230	50	275	639	21	0	140
Bristol, Fourth	180	114	24	41	1	10	13	5	0	0	79	149	572	39	176	179	48	0	37
Plymouth, Second	407	266	75	55	11	29	75	27	0	0	122	339	843	27	495	137	67	1	86
Chicopee	188	77	34	74	3	11	31	9	1	0	55	133	701	34	368	197	29	3	68
Worcester, 1st Northern	166	114	22	27	3	7	18	7	1	0	40	304	613	15	322	111	36	2	63
Charlestown	234	25	152	55	2	38	126	34	0	0	212	238	3,480	46	1,426	1,694	22	6	133
Middlesex, 1st Southern	376	217	107	47	5	55	93	46	0	0	79	212	603	15	242	120	29	0	64
Essex, Eastern	284	199	45	31	9	27	35	20	2	1	140	234	711	27	355	69	35	0	60
Norfolk, Western	231	138	52	41	0	22	46	14	1	0	57	99	437	14	95	234	40	0	64
Middlesex, Central	163	95	40	26	2	11	37	9	0	0	67	193	410	17	121	147	39	0	40
Worcester, 2nd Southern	103	58	31	13	1	9	30	9	0	0	15	87	208	3	55	38	5	0	5
Hampden, Western	81	28	16	35	2	3	12	0	2	0	16	262	735	18	260	262	37	0	53
Berkshire, Northern	49	24	17	7	1	5	16	5	0	0	20	120	374	8	238	49	7	2	31
Marlborough	180	61	95	22	2	46	85	42	0	0	23	120	256	11	123	52	17	0	24
Worcester, 2nd Eastern	97	37	34	25	1	12	30	6	0	0	13	52	237	10	126	32	13	5	36
Newburyport	116	56	31	28	1	11	29	7	0	0	21	277	1,005	21	648	138	52	0	38
Plymouth, Third	91	47	27	17	0	4	25	3	0	0	35	136	474	26	209	142	40	0	37
Peabody	241	109	99	30	3	41	80	35	0	0	86	189	541	10	335	32	15	0	18
Leominster	106	54	18	33	1	1	18	0	0	0	40	46	558	6	308	87	9	3	26
Worcester, Western	76	50	15	10	1	6	10	3	0	0	21	142	220	10	71	50	16	0	28
Worcester, 3rd Southern	117	56	27	17	17	8	27	9	1	0	15	100	151	16	50	22	7	0	7
Hampden, Eastern	42	28	7	6	1	4	7	2	0	0	15	157	795	5	124	605	37	1	42
Plymouth, Fourth	99	42	30	24	3	2	27	2	0	0	24	228	481	17	214	209	39	0	69
Norfolk, Southern	137	83	25	28	1	2	20	1	0	0	45	106	216	7	74	33	14	0	40
Middlesex, 1st Northern	60	43	12	5	0	1	12	1	0	0	19	65	649	0	173	292	47	0	40
Worcester, 1st Eastern	77	30	36	11	0	14	36	14	0	0	15	51	190	3	52	54	10	1	13
Berkshire, Fourth	41	32	5	4	0	1	5	1	0	0	5	82	211	0	95	55	11	0	16
Essex, Second	71	46	14	11	0	11	11	6	0	0	14	91	210	15	113	34	13	0	20
Barnstable, First	123	81	25	13	4	4	22	3	0	0	23	114	555	27	177	99	57	7	43
Barnstable, Second	51	35	1	14	1	5	5	4	0	0	17	44	197	3	58	35	5	0	50
Berkshire, Southern	49	39	6	3	1	3	5	0	0	0	5	102	356	5	116	158	21	3	32
Natick	136	73	36	27	0	17	24	16	0	0	44	71	293	0	104	79	14	0	13
Lee	20	15	5	0	0	2	5	2	0	0	2	50	524	1	147	273	28	0	32
Hampshire, Eastern	35	20	11	4	0	8	11	7	0	0	10	86	278	2	98	127	10	1	3
Franklin, Eastern	30	20	0	3	7	0	0	0	0	0	7	51	118	0	42	55	20	0	5
Essex, Third	54	40	7	7	0	7	6	5	0	0	26	27	156	2	81	54	15	0	7
Winchendon	64	56	5	3	0	4	5	4	0	0	5	40	189	6	94	64	13	0	14
Dukes County	19	9	6	4	0	0	6	0	0	0	2	34	53	4	14	20	3	0	9
Williamstown	10	2	7	1	0	4	4	4	0	0	0	35	69	3	23	11	1	0	14
Nantucket	13	11	1	1	0	1	1	1	0	0	1	0	49	5	11	14	2	0	9
Total	33,009	15,027	9,668	7,464	850	2,847	8,251	2,155	72	26	11,785	28,986	105,936	2,609	41,715	37,132	2,665	228	7,458

ADDITIONAL INFORMATION

Neglected Children	1,356
Inquests held	115
Parking tickets returned to Clerk's offices	66,492
Drunkenness releases by probation officers	16,977

STATISTICS OF THE DISTRICT COURTS OF MASSACHUSETTS FROM OCTOBER 1, 1944 TO OCTOBER 1, 1945 AS REPORTED BY THE CLERKS OF SAID COURTS.

Compiled by the Administrative Committee of District Courts

DISTRICT COURT	Civil Writs Entered	Contract	Tort	Summary Process (Ejectment)	All Other Cases	Removals to S. C. (Total of all removals)	Total Motor Tort Cases entered	Total removals of such to Superior Court	Reported to App. Div.	Appealed to S. J. C.	Supplementary Process	Small Claims	Criminal Cases Begun	Criminal Appeals	Drunkenness Total Number of Complaints	Automobile Cases (total)	Operating under influence of intoxicating liquor	Intoxicating Liquor Cases	Juvenile Cases under 17 years
Worcester, Central	2,634	1,097	1,039	465	33	319	825	241	3	0	554	1,795	5,314	70	2,581	1,188	80	1	673
Springfield	1,959	1,048	118	484	309	109	289	76	2	0	789	1,466	12,691	33	2,948	6,854	100	15	292
Middlesex, 1st Eastern	2,394	1,162	783	427	22	273	680	233	3	0	822	1,930	2,566	59	1,103	824	98	2	283
Roxbury	975	67	190	710	8	57	146	40	0	0	1,010	1,542	7,852	470	3,215	2,030	66	28	732
Bristol, Third	1,003	340	346	309	8	137	301	93	7	3	120	932	1,750	46	733	210	46	21	277
Middlesex, 3rd Eastern	2,524	1,436	684	386	18	110	579	89	9	1	637	1,338	6,113	145	2,011	3,058	106	5	375
Dorchester	877	70	396	404	7	102	312	81	0	0	726	1,006	2,977	142	1,444	781	46	3	203
Lowell	832	334	374	120	4	90	333	80	7	0	177	1,147	1,750	15	1,093	146	50	13	125
Bristol, Second	753	378	191	177	7	58	160	28	0	0	121	735	2,127	85	819	431	55	7	150
Essex, Southern	1,488	660	494	314	20	160	422	113	0	0	415	813	1,804	92	873	296	70	5	158
Lawrence	636	245	286	97	8	72	247	65	1	19	88	320	2,211	0	1,370	183	53	20	109
Norfolk, East	1,526	749	514	250	13	113	452	79	3	0	650	1,447	2,978	89	1,357	949	147	0	294
Somerville	1,497	722	313	267	195	67	275	50	3	0	530	835	1,800	72	701	367	38	3	138
West Roxbury	412	56	100	245	11	25	85	21	0	0	416	723	2,104	75	772	933	40	5	227
Essex, First	1,128	813	195	119	1	87	181	57	1	0	372	717	1,361	95	729	167	68	2	105
Brockton	675	274	229	157	15	42	204	34	6	2	131	409	1,584	51	1,076	328	56	1	84
East Boston	493	68	254	164	7	76	208	69	2	0	329	427	3,012	0	933	745	16	3	304
Chelsea	929	220	449	250	10	120	353	97	0	0	387	573	1,679	109	750	397	49	4	193
South Boston	340	24	179	135	2	15	37	9	0	0	236	390	4,849	99	2,260	1,922	4	1	163
Essex, North Central	391	150	167	68	6	59	141	55	1	0	45	233	1,368	27	714	141	32	0	42
Holyoke	301	133	82	85	1	42	68	0	5	0	68	368	813	7	514	114	29	2	65
Hampshire	142	54	24	46	18	9	21	6	0	0	17	235	1,350	25	509	531	60	0	67
Middlesex, 2nd Eastern	814	406	210	195	3	61	178	43	3	0	243	510	4,121	50	698	2,995	53	15	224
Berkshire, Central	307	175	74	54	4	6	61	3	2	0	79	1,028	1,558	4	446	668	56	0	59
Bristol, First	238	104	69	62	3	22	45	11	0	0	28	136	781	44	294	195	40	1	82
Middlesex, 4th Eastern	513	328	104	74	7	24	101	20	0	0	369	498	1,476	46	482	588	61	2	115
Newton	595	334	143	114	4	34	121	24	2	0	161	492	2,073	40	347	1,532	27	2	117
Fitchburg	168	84	32	50	2	10	22	2	1	0	48	126	1,350	14	1,044	124	31	1	59
Norfolk, Northern	516	331	112	65	8	25	102	21	0	0	195	369	845	12	252	364	35	0	83
Brighton	315	47	68	199	1	22	55	19	0	0	296	599	2,029	43	921	770	21	7	51
Franklin, Greenfield	105	56	22	26	1	2	11	1	1	0	16	284	761	5	248	245	45	14	35
Worcester, 1st Southern	191	110	43	35	3	24	36	16	0	0	26	358	941	17	370	354	43	10	45

The District Courts

The continued effect of war conditions is reflected in the figures for e past year in the following table, as compared with the previous years. The figures for each court appear in the table opposite this ge.

Seven Year Comparison of Business Years from 1938–1945, Oct. 1 to Sept. 30

(*This table does not include the business of the Boston Municipal Court*)

For the figures as to each Court see insert facing this page.

	1938-39	1939-40	1940-41	1941-42	1942-43	1943-44	1944-45
il entered.....	80,998	78,152	78,966	73,723	48,242	36,001	33,009
Contract.....	30,968	30,735	31,069	29,374	22,254	17,330	15,027
Tort.....	34,016	32,759	35,133	31,760	16,978	10,332	9,668
nm'y Process..	14,770	13,673	11,898	10,961	6,603	7,625	7,464
ll other cases..	1,244	985	865	1,628	2,407	724	850
n. to S. Ct.....	13,334	12,805	13,453	12,744	6,955	3,049	2,847
p. to Ap. Div...	294	260	305	304	149	113	72
peals to S.J.C..	24	28	22	23	20	21	26
). Process.....	17,652	19,155	19,878	20,985	18,538	14,639	11,785
ll Claims.....	38,557	40,029	45,281	52,634	40,208	33,057	28,986
inal cases....	149,937	152,631	167,885	154,145	125,486	106,650	105,936
ap. to S.C..	4,867	4,372	4,637	4,057	3,527	2,859	2,609
kenness.....	63,361	61,365	67,991	64,660	54,202	41,227	41,715
der inf.							
x. liq.....	4,409	4,456	5,119	4,077	2,677	2,676	2,665
uto. cases..	48,568	54,016	64,197	54,551	38,942	40,422	37,132
r cases.....	389	447	488	386	387	335	228
ases under							
ears.....	6,270	6,071	5,855	5,918	7,063	7,207	7,458
ot.tortcases	29,585	28,533	31,190	28,425	15,165	8,994	8,251
novals by plf.	6,230	5,353	5,209	3,682	1,860	25	
novals by def.	5,470	5,984	6,822	7,880	4,147	2,270	
novals by both	51	33	44	26	40	1	
Total	11,751	11,280	12,075	11,590	6,047	2,296	2,155
lected children	–	–	–	–	1,235	1,122	1,356
uests held....	–	–	–	–	77	77	115
king Tickets re-							
rned to clerk's							
fice.....	–	–	–	–	–	77,669	66,492
nkeness releases							
y prob. officers	–	–	–	–	–	16,369	16,977

The whole subject of the district court system was referred by the legislature to a special commission consisting of the Judiciary Committee and an additional member appointed by the governor. Among the bills referred to that commission is the draft of a plan for full-time judicial service in all the courts in Suffolk County, together with the reasons for that plan in the 20th. Report and earlier reports of the Council. As there has been some misunderstanding of the nature of that plan we call attention to the fact that it does not contemplate that the "nine courts in Suffolk County become consolidated into one court." On the contrary, the plan would not abolish any of the courts. They would all remain in existence and would simply be brought into a Suffolk County administrative system by extending the jurisdiction of each of the Suffolk courts throughout the county, putting the standing justice of each on a full-time salary, providing that all the standing justices of these courts in conference should be the rule making body for the county, and for the purpose of administering this Suffolk judicial system giving the Chief Justice of the Boston Municipal Court authority to assign each of the judges of these courts to serve anywhere in the county in order that the judicial power of the system might be used where it was needed from time to time on a business plan to dispatch the business; the expectation being that ordinarily the criminal business in the various courts would normally be left in the hands of the local judge and that the authority to assign the judges to sit in other districts within the county would be used for the purpose of disposing of civil business more promptly and thus provide full time work for the full time salary.

By this proceeding, of course, the eight outlying Suffolk courts would be removed from the jurisdiction of the Administrative Com mittee of the District Courts and from their present appellate district because the conference of all the Suffolk judges would constitute a Suffolk Administrative Committee for the purpose of supervising the administration of the Suffolk system. They would also have their own Suffolk appellate division.

We are informed that at the recent hearing before the special commission it was announced by the justice of one of the outlying Suffolk courts that this plan now has the unanimous support of the justices of all the eight outlying courts in Suffolk county.

This recommendation of the Judicial Council has been recommended as a beginning of the approach to a full-time service plan in the district courts, and it is based on the idea that if there is to be a full-time salary there should also be a full-time job. Just as the change from the old full appeal system in civil cases was begun gradually in 1912 in the central Boston court the Judicial Council has felt that the matter of full-time service in the district courts may

be approached gradually by a businesslike plan for the courts in limited area, and within easy traveling distance from each other, and that the adoption of such a plan would provide experience which would be helpful later in connection with other parts of the Commonwealth.

Those who are interested in the history of the discussion of the district court problems since 1876 will find the story in the Law Society Journal for February, 1945, and in the Massachusetts Law Quarterly for May, 1945.

Reports Requested by the Legislature

The Proposal for Majority or "Split" Verdicts in Civil Cases

House 933

This bill (referred to the Council by Resolves Chapter 14) would authorize majority verdicts of nine or more jurors in civil cases. The bill provides that:

> Chapter two hundred and thirty-one of the General Laws is hereby amended by inserting after section eighty the following section: —
>
> *Section 80A.* In the trial of any civil action it shall not be necessary for all the jurors to agree upon a verdict but a verdict may be rendered by nine or more members of the panel, and said verdict shall be decisive of the issues in the action.

1. The Constitutional Question

The first problem which arises in regard to this bill is entirely independent of any question of advisability. Articles 12 and 15 of the Bill of Rights create a right to "trial by jury" both in criminal cases and in civil cases *at law*. The "trial by jury" thus established as a right under the Massachusetts Constitution, and also under the Constitution of the United States, is a "common law" jury trial (See *Com.* v. *Dorsey*, 103 Mass. 412, 418, *Com.* v. *Welosky*. 276 Mass. 398, 401, and *Capital Traction Co.* v. *Hof of 174 U. S.* 13–16).

In the early history of English law a jury consisted of men in the neighborhood who had personal knowledge (or who acquired it) of the facts of the dispute, but by about the middle of the 14th. century the jury had come to be recognized as judges of the facts, not within their personal knowledge, but on the evidence presented to them, and by that time the number of the jury had become established as twelve and the requirement of unanimity in their verdict had become established as part of the common law. That requirement remained thereafter. (Forsyth "History of Trial by Jury," 238–241; Pollock & Maitland "History of English Law," 623–625; Thayer "Preliminary Treatise" on Evidence, 86–90).

While this right to jury trial, both in civil and criminal cases, is a constitutional right, it is a right which may be waived by the person

entitled to it and this fact is recognized in the statutes and in the decisions both of the Massachusetts and United States Courts, but a person cannot be forced to accept less than his right to a common law trial. In one of the latest opinions of the Supreme Court of the United States in which jury trial is discussed (*Patton* v. *U. S. 281* U. S. at p. 288) the court said that one of "the essential elements as they were recognized in this country and in England when the constitution was adopted" is "that the verdict should be unanimous." This requirement of unanimity would still exist even if the parties in a civil suit agreed to accept a verdict of a jury consisting of less than twelve men. This statement of the Supreme Court of the United States reflects also what we understand to be the law of Massachusetts in regard to the requirement of unanimity. It seems clear that the proposal to allow verdicts by a majority in civil cases without the consent of both parties (which is the proposal contained in House 933) would require a constitutional amendment even if the proposal was considered advisable.

2. The Debate in the Constitutional Convention of 1917–18

This whole subject was debated at length in the Constitutional Convention of 1918 in connection with proposals to amend the Constitution by authorizing majority verdicts or authorizing the legislature to provide for them. All of these proposals were rejected by that body. The mere fact that a practice is old is, of course, not alone sufficient reason for its retention, but when the practice reflects the judgment of generations of experienced and thoughtful men it is worth keeping. As the reasons for the requirement of unanimity and for the rejection of the proposed changes were stated with convincing clarity and force in the debate in the Convention referred to which appears in Vol. 1 of the Debates pp. 389–435, we quote at some length from the remarks of men of experience in support of the adverse report of the Judiciary Committee of which the chairman was the late Hon. James M. Morton of Fall River. We call especial attention to the passages quoted from John W. McAnarney of Quincy, a man of wide experience in the courts.

Following these quotations we submit the figures showing the number of disagreements in the various counties of the state during the past five or ten years.

Extracts from Volume I of the Debates in the Convention of 1917

Mr. Shea of Dalton — p. 399

"If every man in this Convention is satisfied, and I think most of us are, to retain the present rule in criminal cases, why is it? Is it not true that we wish to

get the protection of every man on that jury? Is this because liberty and life are more precious? Yes, indeed they are, but is the principle any different? Gentlemen of the Convention, we of the Judiciary Committee thought not . . ."

Mr. Charles F. Dutch of Winchester — p. 403

"I won my first jury case only because one man out of the twelve held up and insisted on serious consideration of the matter for some three hours and won the entire jury to his view, so that my client, who in that case was a poor client and could not afford another trial and could not afford to lose, was protected by the unanimous rule. . . ."

Mr. John W. McAnarney of Quincy — pp. 404, 405, 406, 407

"It puts the individual responsibility, a solemn and serious responsibility, upon each one of the jurors. Every one of them then takes the cause under the solemnity of his oath. . . ."

"The law draws together twelve men from different walks of life, of different training, different habits and mode of thinking and in approaching the solution of every problem that may be submitted to them, each has the benefit of the experience and views of all the other members. What is necessary that a just verdict should be returned when twelve such men meet to consider the proposition? It can be answered in one word, — deliberation. Fair deliberation is what is needed to bring in a just verdict. . . .

"And is not that, sir, what you would want if you were on trial before a jury? Do you want cases decided without due and careful deliberation by each juror? The very purpose of unanimity is not to preserve a relic of antiquity, but it is to carry into the jury room that which every one of us asks, expects and ought to be able to receive, — calm, deliberate, thoughtful consideration by those who are passing upon our property rights or liberties.

"Shall you say to the jurors of this Commonwealth: 'Gentlemen, you have not got to decide this case by sitting down calmly and thoroughly considering it; go out and poll it as you would a political contest and decide it by a majority verdict'? Or shall you say to them: 'Gentlemen, remembering the responsibilities of your oath approach the consideration of this question from the viewpoint of studying it thoroughly and carefully and then bring in your decision whichever way it may go'? . . .

"I will not approach the discussion of this question from the viewpoint of those who come here citing their personal experience in one or two cases. It seems to me that belittles the question. I have had some experience in the trial of causes. My experience as plaintiff's attorney has been very large. I also have defended many causes. . . . How true it is we frequently find when twelve men get together there are some of them, two or three of those men, who, by virtue of their training and business experience, have more knowledge of the particular subject-matter involved in the case than their fellows, and if a majority verdict were to determine the question on the first ballot it might be ten to two; yet when it requires a unanimous verdict those two men, honest and conscientious, responding to their oath of office, sit there and discuss with their fellows and tell them what they know of the problems presented by the trial, lending the weight of their judgment and experience to their fellows. How often their fellow-jurors, profiting by their advice,

their knowledge and experience, have reversed the first ballot and brought in a just and true verdict in the end. We have disagreements, — yes, we do; we always will have them. It makes no difference whether you require a unanimous verdict or eight out of twelve or nine out of twelve or ten out of twelve, you still will have your disagreements. But are those disagreements many in proportion to the great number of causes that are tried? Will any lawyer rise in this Convention and out of the wealth of his own experience tell you that in a large percentage of his cases tried under the system now in existence he has had disagreements? None will do so, because the contrary is true; juries have agreed and they do agree in the overwhelming majority of cases. . . .

"Mr. Chairman, this is a grave and an important subject. My friend on my left in the first division (Mr. Dutch) when he recited the experience of his first case struck the keynote. . . .

"In conclusion, not one lawyer of experience in the trial of jury causes, not one party who ever had been a litigant in our courts, not a man who ever has served on a jury, came before the committee and advocated such a change as is proposed, not one. Their absence was eloquent and significant. . . ."

Mr. Asa P. French of Randolph — pp. 409–410

"After a longer experience than I care to remember, both in the State and the Federal courts, I have acquired a profound though not, I hope, a servile respect for the verdict of a jury. The jury system, sir, like all other human systems, as has been so frequently said, is far from perfect, for 'except all men were good,' as More says in the 'Utopia,' 'all things cannot go well.' And there are bad juries and good juries because there are bad men and good men; there are weak juries and strong juries because there are weak men and strong men. It is unfortunate for a litigant on either side of the case if he is obliged to present his case or his defence to a weak jury or a jury the majority of whom, as is sometimes the case, are the weakest men upon the panel. It is a misfortune if a party comes before a bad jury, for the same reason. Of course we all know who have had experience in jury trials that the men upon a panel often vary widely not only in their experience, in their intelligence, in their education, but in their sense of honesty and justice. . . .

"Ordinarily when a jury stands ten to two there may be a difference of opinion as to whether the two are right or wrong. But unanimity is based upon the well-known human experience that minorities are often right, that the strong men sometimes will stand up against the bias and prejudice of their fellows who are weaker and will not allow an injustice to be done, whether it be against the rich or the poor. . . ."

Hon. James M. Morton of Fall River — p. 415

"Something is said about the compromises which juries make. Of course they compromise, and their right to compromise is recognized by the court, as it should be, and as it has been, as a means of arriving at a just verdict. When a verdict is rendered the court accepts it, and the fact that it is reached by way of compromise between intelligent and honest men should not, and does not invalidate it. . . ."

Mr. John W. McAnarney of Quincy — pp. 431–432

"Twice during the course of this debate has *Commonwealth* v. *Tuey* been referred to. May I refer to it a third time and give you the law as finally declared in that case by Mr. Justice Bigelow, who rendered the opinioh of the court?

'The jury room is, surely, no place for pride of opinion, or for espousing and maintaining, in the spirit of controversy, either side of a cause.'

Do you gentlemen agree with that? (Reading):

'The single object to be there effected is to arrive at a true verdict' —

Does any man in this Convention doubt the truth of that statement? (Reading): 'and this can only be done' —

Mark you, how?

'and this can only be done by deliberation, mutual concession, and a due deference to the opinions of each other.'

How otherwise, gentlemen, do you want a conclusion of fact to be arrived at? (Reading):

'By such means and such only, in a body where unanimity is required, can safe and just results be attained;'

And now mark you, sir, these concluding words, because to my mind they are the last words upon this subject:

'and without them,' —

Without what?

'without them,' —

Without what?

Without 'due deliberation, mutual concession, and a due deference to the opinions of each other.'

'and without them, the trial by jury, instead of being an essential aid in the administration of justice, would become a most effectual obstacle to it.' (*Com.* v. *Tuey*, 8 Cush. 1, 4.)

There, sir, you have the opinion of our Supreme Judicial Court. Without that deliberation, concession and deference of opinion to which the court refers, trial by jury becomes an effectual obstacle to justice, and not an aid to it. . . ."

Mr. John Mansfield of Boston — pp. 434–435

"Mr. Chairman, my personal experience when I served as a juryman, my observation since then while I have been taking such activities as I could as a member of the bar, has been this: That sometimes the one man of the twelve who sat to listen to a case supplied the very thing which leavened the whole loaf and which inclined and finally succeeded in obtaining a jury to realize and to consider all points of view and to arrive finally at a better decision than they would if that man were disregarded. What would happen were you to authorize the Legislature to pass a majority law, and the Legislature then did so? Simply this: Twelve men would walk into a jury room. They would sit down. They would vote at once. Two or three among them would vote in the minority; the others as a majority would agree. Perhaps among that minority might be the most honest, the most disinterested, the most learned, the most experienced and the most sympathetic with the people, and with the corporations, and with all parties involved, who are sitting upon that jury. In the minority might be one man or two men or three men who might have the pluck, the backbone and the audacity to defy the judge sitting in the courtroom, who had purposely and intentionally sought to sway the minds of that jury and to induce them to reach a conclusion

which he favored. There might be in that minority, sitting in that jury, one man or two men or three men who, with sufficient force, with sufficient persuasion, with sufficient ability, might explain to their colleagues on that jury their view of the situation, so as to convert them. That has been done, Mr. Chairman and gentlemen, far more times than any of my learned friends here, lawyers of great ability, have had juries disagree on cases which they have tried before them. The one man or the two men or the three men have done far more to obtain justice for the poor man they speak of, they have done far more to prevent gross injustice to every party in a case, than in my humble opinion could be attained by giving a majority of any number less than the whole of a jury the power to decide a question. To pass such a measure, to embody it in the Constitution, to institute it in legislation, would mean simply that when a jury considered a case they would give it simply snap and immature judgment, and not a mature deliberation. I hope, Mr. Chairman and gentlemen of the committee, that this measure will be defeated. . . ."

The Number of Disagreements

One of the leading supporters of the majority verdict plan in the Convention was Hon. Sanford Bates. He was also a member of a Committee of the Massachusetts Bar Association with John E. Hannigan, still in active practice, and the late Thomas W. Proctor, two of the most experienced jury lawyers. Messrs Proctor and Hannigan of that committee, opposed the change and after inquiry of the clerks of court, reported that in 1916 out of 2562 jury trials of all sorts, civil and criminal, there were only 71 disagreements throughout the Commonwealth. (See 3 Mass. Law Quarterly No. 3, Feb. 1918, pp. 81–83.)

Following the same plan, the Judicial Council has not only inquired of members of the bar, but has obtained from the clerks of court the figures from the different counties as to the number of disagreements during the past five or ten years in civil cases.

In Middlesex County during the past five years there were 7 disagreements. In Norfolk County in the past five years there were 3 disagreements; in Hampden County during the past ten years there were 6 disagreements; and in Franklin County 5; in Barnstable County none; in Hampshire County, in ten years, 9; in Berkshire County, none in ten years; in Plymouth County, in 19 years from November 1926 to September 1945, 9 disagreements out of 1,274 *civil* cases submitted to a jury and from February 1927 to September 1945, 18 disagreements out of 1,432 *criminal* cases; in Essex County, 6 in *civil*, 12 in criminal in the last ten years; in Bristol County, 3 in civil cases in the last five years and 1 in a criminal case in the last ten years; and in Worcester County, 3 in civil cases and 3 in criminal cases in the last seven years.

The most illuminating figures appear in Suffolk County in a report by Mr. Phinney, the Executive Clerk of the Chief Justice of the Superior Court, covering a period of 15 years on both the civil and criminal side of the court. The marked decrease is noticeable in dis-

agreements following the adoption of the practice of "pooling" the jurors as a single source of supply in place of the old system of a separate jury panel for each session.

SUFFOLK COUNTY

SUPERIOR COURT, *Civil* VERDICTS — DISAGREEMENTS

Year ending June 30	*For Plf.*	*For Deft.*	*Total*	*Disagreements*
1931	641	282	923	33
1932	521	270	791	22
1933	426	213	639	21
1934	430	272	702	20
1935	405	222	627	11
1936	391	270	661	12
1937	356	216	572	18
1938	321	301	622	5
1939	406	270	676	7
1940	406	314	720	8
1941	366	290	656	6
1942	413	289	702	6
1943	433	313	746	3
1944	371	198	569	10
1945	309	204	513	2

Ordered verdicts not included.
Two or more Verdicts may have been in one case.
July pooling began in May, 1935.
Pre-trial Sessions began in August, 1935.

SUFFOLK COUNTY

SUPERIOR COURT, *Criminal* VERDICTS — *Disagreements*

Calendar Year	*Verds. Guilty*	*Verds. Not Guilty*	*Total Verdicts*	*Disagreements*
1931	614	1154	1768	28
1932	789	1064	1853	12
1933	809	1107	1916	14
1934	887	1076	1963	11
1935	657	859	1516	14
1936	437	575	1012	5
1937	423	474	897	9
1938	316	392	708	1
1939	366	455	821	–
1940	323	539	862	8
1941	305	447	752	4
1942	218	325	543	–
1943	180	360	540	1
1944	237	339	576	3
Jan.-June, inc. 1945	75	168	243	–

Pro forma verdicts included.
Jury pooling began in May, 1935.
Two or more verdicts may have been in one case.

All these figures, in our opinion, show very clearly that there is no occasion for the proposed change to majority verdicts.

We consider House 933 unconstitutional and, for the reasons stated in the passages quoted from the debate in the convention of 1917, unwise.

REPORT ON HOUSE 513, HOUSE 1122, AND HOUSE 1123, RELATING TO DIVORCE (*Referred to the Council by Resolves Chapter 11*)

House 513 would allow divorce after three years of separation regardless of the cause of separation. We see no sufficient reason for the passage of this bill.

Another part of the bill provides that no divorce shall ever be granted to any person "to whom or from whom a divorce has previously been granted." We do not recommend this provision.

House 1122 would change the period from six months to one year before a decree *nisi* in divorce becomes absolute. When a divorce is granted the decree granting the divorce is provisional to the extent that six months must elapse from the date of the decree before the divorce becomes absolute. The provisional order is called for short in lawyer's Latin a "*decree nisi.*" The six months period allows for further unforeseen circumstances. We believe this period to be sufficient and we do not recommend the extension of the period to one year. The present law has been in effect for many years and is well understood.

House 1123 proposed to eliminate the two year period which must now elapse before the party against whom the divorce is granted may remarry.

The present statute Section 24, Chapter 208 provides:

> "After a decree of divorce has become absolute, either party may marry again as if the other were dead, *except that the party from whom the divorce was granted shall not marry within two years after the decree has become absolute.*

The present statute, we have been informed provides a trap with resulting tragic consequences, not only for persons marrying without knowledge of this two year restriction, but for children who may be born of such a marriage. Various cases have occurred in which women who are residents of other states have married men who had been divorced in Massachusetts without knowing that he was still under a two year disability, and, on coming thereafter to Massachusetts, with their husbands, discovered that while their marriage was valid outside of Massachusetts it was invalid and their children were illegitimate in Massachusetts. This does not seem to be a healthy condition of the law which invites such consequences. The legislature years ago took one step to cure the situation to some extent by Section 6 of Chapter 207 which provides that even in

Massachusetts a marriage with one of the parties acting in good faith may ripen into a valid marriage under certain circumstances, but that statute does not help the marriage within the two year period after a divorce has become "absolute." (See *Wright* v. *Wright*, 264 Mass. 453). In our opinion it is not a question of sympathy for the party at fault on the record, but a question whether another person without fault is to be branded as unmarried and whether innocent children are to be branded "illegitimate." We do not think they should be. *We recommend the passage of House 1123.*

For convenient reference we insert in Appendix A a statement of the varying practices in other states from Vernier's "American Family Laws."

House 366 and House 1233 as to Declarations of Insane Persons before Insanity

These two bills (referred to the Council by Resolves, Chapter 15) would make admissible as evidence, declarations of an insane person before the insanity on the same basis as declarations of a deceased person.

House 366 provides

> Chapter two hundred and thirty-three of the General Laws is hereby amended by inserting after section sixty-five A the following new section: —
>
> *Section 65B.* A declaration of an insane person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action, upon the personal knowledge of the declarant and prior to the time he or she became insane.

House 1233 provides that

> Section 1. In any action or other civil judicial proceeding, a declaration of a person who shall have been duly adjudged or found to be an insane person . . . shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that such declaration was made in good faith, upon the personal knowledge of the declarant, and while he or she was of sound mind.

In the memorandum submitted to us by the Committee on the Amendment of the Law of the Boston Bar Association the members of that committee opposed these two bills for the following reasons:

> "In theory, it might seem that if a declaration of a deceased person can be admitted in evidence, with certain safeguards, a prior declaration of a person who has become insane could also be admitted. The difficulty, however, lies in the findings of preliminary facts which have served as an adequate safeguard in connection with deceased persons. With reference to the insane, the question will always be, When did the party become insane? There is no difficulty at all in determining when a person died, but the question as to when a person became

insane is fraught with such complexities that any case in which such a proposed statute were invoked would become primarily an issue as to the date of insanity, rather than for the determination of the principle issues shown by the pleadings. We oppose this proposed legislation because of the difficulty which would always be present in establishing the date when the person in question became insane.

"Another angle to this same objection to these bills is that it would be almost impossible for a party not connected with the insane person to either prove or disprove the question as to the date insanity commenced.

"It is true that in will cases these questions of the date of insanity [or of a lucid interval] are frequently raised and decided. But in those cases the question of insanity [or of a lucid interval] *i.e.*, testamentary capacity is the principle issue. It is the matter upon which the entire probate proceeding is based.

The grounds of opposition of the bills thus stated seem to us sound, and accordingly we do not recommend the bills. It may be added that a particular declaration which someone may wish to use in evidence might be itself a part of, or a symptom of, or an expression of, the insane condition and the difficulty of detecting this fact seems to be an additional illustration of the objections to this sort of evidence.

WRITTEN CONTRACTS BETWEEN HUSBAND AND WIFE

Senate 374

(Referred to the Council by Resolves Chapter 26)

Sections 1 and 2 of this bill would amend Sections 2 and 3 of chapter 209 of the General Laws so as to provide that "a married woman may make written contracts with her husband."

Section 3 would amend Section 6 of the same chapter to allow suits between husband and wife as follows:

"Section 6. A married woman may sue and be sued in the same manner as if she were sole: and in addition to proceedings in equity or other proceedings now recognized by law this section shall authorize suits between husband and wife on written instruments to the same extent as if they were sole."

Married women have had full control of their separate property for many years but Massachusetts retains by statute the common law prohibition of contracts between married persons based on the common law theory that husband and wife are one person.

At present General Laws chapter 209 section 1 provides that:

"the real and personal property of a woman shall upon her marriage remain her separate property and a married woman may receive, etc., property, real and personal, in the same manner as if she were sole . . ."

Section 2 provides that:

"a married woman may make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole; *except that she shall not be authorized hereby to make contracts with her husband.*"

Section 3 allows husbands and wives to convey real estate to each other except by mortgage provided the deed is recorded.

Section 6 of chapter 209 now provides that:

> "a married woman may sue and be sued in the same manner as if she were sole; *but this section shall not authorize suits between husand and wife.*"

Presumably the reason for these italicized provisions of the Massachusetts statute is the policy of discouraging suits between husband and wife on the ground that such suits may interfere, in some way, with family life. The application of this policy to loans appears in the statement of the court in *Barbour* v. *Sampson*, 266 Mass. 180, at 182,

> "The law in this Commonwealth is established that the wife cannot maintain proceedings either at law or in equity against the husband, or his estate after his death, or the partnership, or surviving partner to compel repayment for money so lent."

On the other hand, as Chief Justice Rugg said in *Crosby* v. *Clem*, 209 Mass. at page 194:

> "there is nothing in law to prevent the husband from executing and delivering *to a third person* a valid note, mortgage or security for money advanced by her to the husband or for his benefit . . ."

It is clearly recognized, therefore, that what cannot be done directly can be done indirectly through a third person. It is also clearly recognized that although contracts as to loans, partnerships and other matters cannot be made the basis of suits *directly* between married persons, yet such a direct suit may be brought to enforce a trust or to recover, or establish, rights in property *where no contract is involved.* This has long been recognized as appears from the opinion in *Levy* v. *Levy* 309 Mass., at page 491 the courts said:

> "It is settled that jurisdiction in equity exists of conflicting rights of husband and wife concerning property . . ."

While "hard cases" may occasionally arise under the existing law above quoted the problem appears to be one of weighing the policy of the prohibitory statutes (in discouraging direct suits between husband and wife and reducing the opportunities for possible fraud if they could contract directly with each other so far as their creditors are concerned) with the policy of reducing such occasional injustices as may result from the failure to recognize the legality of written contracts.

On this question of policy the judgment of the Council is in favor of the existing law and, therefore, we do not recommend the passage of Senate 374.

The situation in other American states is described in Vernier's "American Family Laws," Volume 3, pp. 65–66 — cf. Ohio Code §7999.

House 365, An Act to Reduce the Amount of Repetition in Mortgage Deeds Recorded and Stored in Registries of Deeds. (*Referred to the Council by Resolves Chapter 12.*)

The bill was drawn by a committee of experienced conveyancers appointed by a conveyancing group in Boston to study the subject. That committee reported as follows:

1. It is recognized that repetitions of mortgages in the same form cause an undue burden on Registries and expense to the public.
2. That this burden can be relieved by the use of incorporation by reference much more liberally than it is now used.
3. That the desires of the individual mortgagees are too various to make it advisable to develop the existing short forms.
4. That as a method of relieving this burden, we recommend a statute substantially in the following form:

DRAFT ACT

Chapter one hundred and eighty-three of the General Laws is hereby amended by inserting after section twenty-four the following new section: —

Section 24A. A declaration of mortgage provisions signed by any person and acknowledged by him before any officer authorized by law to take acknowledgments of deeds may be filed for record in any registry of deeds and shall be recorded therein. Thereafter, all or part of such provisions may be incorporated by reference to such declaration in any mortgage relating to land, whether registered or not, which lies in the registry district where such declaration is recorded. Such incorporation by reference may be by substantially the following language: —

The provisions contained in a declaration of mortgage provisions dated and recorded with Deeds, Book , page , are hereby made a part of this instrument, except so far as inconsistent with any provisions herein contained.

For the information of the mortgagor, a copy of such declaration of mortgage provisions shall be annexed to any mortgage containing a reference thereto, but such copy shall not be recorded, nor shall the failure to annex such copy invalidate said mortgage. The incorporation of provisions in mortgages by reference in any other legal manner shall not be affected hereby.

This report with the draft act was printed for the information of the bar as a basis for discussion in the Mass. Law Quarterly for December, 1944 with the statement that the report was considered and approved at a meeting of the organization referred to. The subject matter of the bill had also been discussed in print in the Mass. Law Quarterly for December, 1943. (Pps. 50–51) so that the subject has been before the bench and bar for two years.

The purpose of the bill, as stated in the report above quoted, is to

avoid unnecessary expense to the public through the county treasuries for copying and storing until the end of time the same words over and over as was the practice in regard to quantities of words during more than two hundred years prior to 1912. In that year as a result of the work of a committee of conveyancers of which Hon. William T. A. Fitzgerald, register of deeds in Suffolk County was chairman, the legislature passed what is known as the "short form of deeds" act under which shorter deeds have been used ever since with a great saving of expense in copying and storing to the counties as well as saving the time of title examiners in reading the records. Under that act, the common forms of covenants and mortgage conditions and powers of sale were stated in the statute and described as statutory forms, which could be incorporated by reference in the deed.

Before that act was passed, the records in the Suffolk registry of deeds were rapidly accumulating for public storage in volumes of about 600 fools-cap pages each and a similar accumulation varying in amount with the different counties was going on all over the commonwealth.

With the change in conditions and the growth of new problems in connection with real estate, many clauses have become needed in many mortages, and in recent years, the Homeowners Loan Corporation has constantly appeared in the record books with mortgages covering three full typewritten foolscap pages. We are informed that many of these mortgages are recorded in the larger registries. These with other long federal, or bank, documents are again filling up the registries for perpetual storage at public expense with hundreds of pages of unnecessary repetition of the same words annually.

This piling up of waste paper is unnecessary from a legal point of view. It is legally possible, and more than one experienced conveyancer's practice is, to record one long form, and in later mortgages incorporate, by reference to that form, those provisions, which are mere repetitions from the recorded long form. For the convenient information of the mortgagor or others interested, the parts thus incorporated are printed on the back of the mortgage, but not to be recorded. We are informed that a few years ago, in connection with the development of a large tract which was cut up into small lots, some 265 mortgages, all having identical provisions, were drawn in this way, and the copying and storage of much waste paper and many words at the public's expense was avoided. All this was done and could be done today, without any statute, but the bar, and particularly the conveyancing bar, and still more particularly, government officials, are apt to be hesitant about stepping out of the beaten track. We believe that statutory encouragement expressly recognizing the practice of incorporation by reference described above would result in the course of time in a substantial saving to the counties

both in money and in storage space for record books, which are constantly accumulating and which must be kept so that they may be readily accessible in the examination of titles.

We recommend the passage of House Bill 365 for these reasons and we understand that the bill also has the support of the Committee on the Amendment of the Law of the Boston Bar Association as a carefully drawn bill.

House 1129 Relative to Receivers in Actions by Tax Collectors

The "subject matter" of this bill was referred to the Council by Resolves Chapter 12. The bill would amend chapter 60 of the General Laws by inserting five new sections after section 35 of chapter 60 which now authorizes an action by a tax collector for unpaid taxes against the person assessed on the expiration of three months after commitment of the tax bill to the collector.

The proposed five new sections are in the footnote.*

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* HOUSE 1129

AN ACT RELATIVE TO THE APPOINTING OF A RECEIVER IN ACTIONS BY TAX COLLECTORS

Chapter sixty of the General Laws is hereby amended by inserting after section thirty-five, as amended by section two of chapter one hundred and fifty of the acts of nineteen hundred and thirty-eight, the five following new sections: —

Section 35A. Upon the entry of any such action involving taxes on property other than a dwelling house, the court in which the action is entered shall, upon motion of the collector, appoint a receiver of the property of the defendant against which the tax was assessed, with full authority to take charge of all of such property and to collect, get in and take over all the rents or other income thereof and to hold and expend the same in accordance with the orders of the court.

Section 35B. Upon the entry of a final judgment in any such action in favor of the plaintiff, and the expiration of the time for appeal, if no appeal is taken, or upon the entry of a final decree therein after rescript from the supreme judicial court following such an appeal, the court shall order such receiver, after the deduction of such amounts for services and expenses as may be allowed by the court, to pay over to the plaintiff so much of the balance remaining in his hands as may be necessary to satisfy the judgment obtained by the plaintiff. If after such payment there remains any sum undistributed in the hands of the receiver the court shall order the same paid to the defenadnt. Upon such payments being made and the allowance of the receiver's account, the receiver shall be discharged.

Section 35C. After the appointment of a receiver under section thirty-five A, the proceedings for the appointment of a receiver shall not thereafter be dismissed or the receiver discharged until all amounts which have come into the hands of the receiver have been distributed under the provisions of section thirty-five B, unless the debtor, before such dismissal, deposits with the court, to the use of the plaintiff, such amount of money as the court, after notice to the plaintiff and a hearing, finds sufficient for the protection of the plaintiff's claim. Such money so deposited shall be held by the court to be paid and disbursed as provided in section thirty-five B as to the funds in the hands of the receiver.

Section 35D. Upon the entry of any final judgment in favor of the defendant in any such action, if the receiver has not been discharged, under section thirty-five C, an order shall be entered discharging the receiver and ordering him to turn over and deliver to the defendant all property and moneys in his hands and possession, less such sums as may be allowed him by the court for services and reasonable expenditures of the receivership; and if the receiver has been discharged and any funds have been deposited with the court under section thirty-five C, the court shall order the same paid over to the defendant forthwith.

Section 35E. Upon the appointment of a receiver under section thirty-five A, he shall furnish a bond in such sum and with such sureties as may be approved by the court making the appointment, which bond shall be in the form provided for in section seven of chapter two hundred and three of the General Laws.

We do *not* recommend the bill. We believe that as drawn it would be disastrous to many real estate owners and to the value of much real estate in some localities under the alleged present common practice of excessive assessment of property far above market value — as indicated by the pendency annually of from 10 to 12 thousand appeals to the appellate tax board as shown by the table on page 82 of our 20th. Report and on page 82 of this Report.

As to the "subject matter" of receiverships in connection with the collection of taxes, which means the taking over by the municipality or by someone on its behalf, of the rents and profits of the property thus stepping in to the position of the owner or the landlord of business property without regard to the effect on the care, upkeep, tenants and operation of the property, we respectfully request more time for the consideration of this "subject matter." This matter was referred to the Council in addition to 16 other subjects which have required study in addition to other matters which were already being considered by the Council. Within the past month we have received not only a communication from the Boston Real Estate Board protesting against House 1129, but also, still more recently, from the Massachusetts Federation of Taxpayers Associations a study of this subject which, while protesting against House 1129 as "entirely inadequate and definitely objectional in some of its details," suggests other drafts of legislation for the consideration of the Council, based on the practice in New Jersey, with references to the laws in Illinois, Ohio, Tennessee, and New York. The subject is also discussed in 3 "Law and Contemporary Problems 382," in a report of the committee on a Model Tax Collection Law in 24 "National Municipal Review" (Supp.) 293 and in a criticism of the model act, in 24 "California Law Review" 98. The subject is one of serious concern not only to the municipalities but to the landowners in the commonwealth. It involves the question whether any reasonable plan of receiverships can be worked out to prevent what is alleged to be the "milking" of property by an owner, while the taxes are unpaid, without increasing the burden on real estate by assisting in the "milking" of the property, through over assessments, by destroying, or seriously interfering with, any efforts of honest owners to improve the property or to keep it in repair, by interfering with the management causing tenants to leave who may not care for public authorities as landlords, and, thus, in a variety of ways depreciating the market value of the property beyond hope of recovery. We have had called to our attention by the Boston Real Estate Board, as an illustration, an office building in Boston which was assessed for eight hundred thousand dollars. On appeal the Appellate Tax Board reduced the assessment to four hundred thousand dollars. Subsequently the property was reassessed for seven hundred and fifty

thousand dollars. Although efforts had been made to improve the condition of the building, it was not considered marketable for more than one hundred and fifty thousand dollars, and even that figure, as a possible price, was doubtful in view of the very large over-assessment with the resulting annual burden of taxes which any owner would have to meet. Accordingly, as the taxes could not be met the property was taken over by the city although on the city's assessment of its value the security of the city's lien for three years' taxes was about five times or 500% of the amount of those taxes.

The question is also raised whether there should be discrimination in the matter of collecting taxes between dwellings and business property and whether a large apartment house is a dwelling, etc. As all these subjects cannot be considered in a hurry we respectfully suggest that the report on the "subject matter" be postponed until the annual report of 1946.

Meanwhile, as already stated, we do not recommend the passage of House 1129.

In connection with this subject it should be remembered that the municipality has a lien for taxes which is paramount and that if the property is worth saving a mortgagee, if there is one, can pay the taxes. In many cases during the depression in a number of cities and towns we understand that authorities have waited for a number of years to give owners a chance to pay up and they have done so. If a receivership law had existed during the depression the owners could, and probably would, have been "frozen out" and conditions would have been worse than they were. While the municipalities should get their taxes, it is also important that land owners who are not trying to "milk" the property but to save it, should have some consideration and it is a serious question how far the tax gatherer should be given machinery for "breaking" the taxpayer and the property.

It should also be remembered that section 19 of chapter 60 of the General Laws now provides that "If the assessors are of opinion that the credit of a person taxed is doubtful or that he is about to leave the commonwealth, they may, by a special warrant, direct the collector forthwith, without demand or notice, to compel payment by distress or imprisonment, whether the tax is payable immediately or at a future day, by instalments or otherwise."

The law now provides, therefore, that the municipality has what amounts to a paramount first mortgage which is called a "lien" on the land. It may also bring suit against the person assessed. It may also proceed either by arrest and imprisonment of the person taxed or "by distress" which means taking personal property belonging to him and holding it as security for the tax. We have been informed that in some places taxpayers are sometimes arrested for failure to pay real

estate taxes. That is a pretty drastic remedy against a man who may be struggling to keep his property during depressed conditions. If he were also subjected to a receivership with its additional cost his ruin might be completed.

House 434 and House 435 Relative to Neglected Children

(*Referred to the Council by Resolves Chapter 15*)

The Council held a conference with Mr. John C. Lane, the petitioner for these bills, representatives of the Department of Public Welfare having to do with child guardianship, and Mr. Theodore Lothrop the general agent and attorney for the Society for Prevention of Cruelty to Children which institutes most of the proceedings for the protection of neglected children. House 435 was supported by the representatives of the department. The practical operation of the present law was discussed by all. After considering the information thus received and the history of the present statutes we report as follows:

First — As to House 434

Sections 42–47 of chapter 119 of the General Laws now provide for commitment to the care of the department or other agency of a child adjudicated "neglected" if the court decides that the welfare of the child requires removal from the custody of its parents or others. The department or other agency may restore the child to its parents whenever it believes that conditions and the welfare of the child warrant such return. After a commitment the department has the authority and responsibility as to the "welfare of the child" which "is the paramount consideration" and, as the court said under earlier statutes, "it is to be presumed that public boards and offices will discharge their duties faithfully and properly" subject to a writ of habeas corpus if they do not. (See Wares Petitioner, 161 Mass. at p. 72 and *Com.* v. *Ball*, 259 Mass. at p. 151.)

Senate 434 would provide after commitment for an application by parents or others to the court for "review of all the facts" "not more than twice within any one calendar year."

The department has some thousands of children under its care and has no desire to keep any of them longer than the welfare of the child requires, and it is its duty not to keep them any longer than that. As stated by the court, that is their responsibility. We see no sufficient reason for inviting repeated hearings on the whole case before the court which in many cases would have to learn the story all over again at each hearing which might be before different judges. House 434 would interfere with the long established policy and purpose of the department's functions. As already pointed out, it is always

possible for parents to apply for a writ of habeas corpus if the department is acting improperly. We believe that opportunity to resort to the courts to be sufficient after the original commitment.

We, therefore, do not recommend House 434.

House 435 to Allow Appeal from Commitment of Neglected Children

Chapter 119 as already pointed out, provides that a court "may" adjudge a child neglected and commit the child then or at some later time as the court deems best for the child. The only appeal provided by Section 47 is "from the adjudication." House 435 would add a second opportunity to appeal from a district court to the superior court by inserting in section 47 the words "and also may appeal to said court at the time of the order of commitment."

The reasons advanced for this bill by the petitioner and by the representatives of the department are that it is a common practice in a number of district courts in the eastern section of the commonwealth to make an "adjudication of neglect" but to leave the custody with the parents or others on probation with the warning that if they do not improve the home conditions a commitment will be made removing the child from their custody. This operates successfully in many cases, but in a substantial number the conditions have changed for the worse after a considerable period of time, sometimes from 1 to 10 years or more, so that a child adjudicated neglected at the age of 3 or 5 may be committed to the department when he is in his teens on the original "adjudication" without any chance for either the parents or the department to appeal from such "commitment" It is urged that the removal from custody by the "commitment," which separates the family, should be subject to appeal. We understand that the practice in some of the district courts is not to make any adjudication until the conditions are such as to call also for a commitment.

The details of procedure are of importance to children and their parents, as well as to the public, and the more effective administration of the department and one which, in our opinion, should be clarified and simplified for their better understanding. We think that it will not only be more just, but that it will be understood by those involved to be more just, to allow an appeal from the order of commitment which separates a child from the family.

We, therefore, recommend the following

DRAFT ACT

Section forty-seven of chapter one hundred and nineteen of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by inserting after the word "held" in the fourth line the following: — and also may appeal to said

court at the time of an order of commitment, in which event the entire case shall be before said Court, as if originally commenced therein." And by adding at the end of said section the words "at the time of adjudication and also at the time of committment."

House 256

(*Referred to the Council by Resolves Chapter 34*)

An Act Creating a Board to Investigate and Report Relative to War Veterans Who are Held for Criminal Trial

Section 1. There shall be a board of five persons, to be known as the Special Board of Investigation of Criminal Cases against War Veterans, who shall be appointed by the chief justice of the superior court. One of the members of the board shall be a psychiatrist, and at least two of them shall be clergymen. Any member of the board may be removed by the chief justice. The board shall be provided with suitable office accommodations, in the Suffolk county court house or elsewhere, and may employ such assistance as is needed to perform its work. The members of the board shall receive no compensation for their services, but they shall be allowed the necessary expenses incurred in the performance of their official duties. The board may expend for the purposes for which it is established such sums as the general court may appropriate.

Section 2. Whenever any person in the military or naval service of the United States in the time of war or insurrection, or honorably discharged or released from such service, is indicated by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court or the trial justice, as the case may be, shall give notice to the board created by section one of this act, and said board shall make an investigation of the war record of such person with a view to determining to what extent, if any, his military or naval service may have caused a mental condition which would affect his criminal responsibility. The said board shall file a report of its investigation, together with such recommendations as it may deem advisable with respect to the disposition of the case, with the clerk of the court in which the trial is to be held, and the report, and recommendations, if any, shall be submitted by the clerk to the court, and such report and recommendations shall be accessible to the probation officer of the court, the district attorney and the attorney for the accused. In the event of failure by the clerk of a district court or the trial justice to give notice as aforesaid to the board created by section one of this act, the same shall be given by the clerk of the superior court after entry of the case in said court. Upon giving the notice required by this section the clerk of a court or the trial justice shall so certify on the papers. Any clerk of court or trial justice who wilfully neglects to perform any duty imposed upon him by this section shall be punished by a fine of not more than fifty dollars.

Section 3. Nothing in this act shall be construed to affect in any way the powers and duties of the board of probation or of probation officers under existing provisions of law, or to affect in any way the provisions for investigating, under section one hundred A of chapter one hundred and twenty-three of the General Laws, the mental condition of certain persons held for trial.

We do not believe in providing by law that veterans should be considered as a separate class from the rest of the community in the administration of the criminal law. We do not believe that returning veterans wish to be so treated. Of course, they should be treated with every consideration which their individual cases call for under the circumstances. We believe that the courts and the probation officers are conscious of the problems which may arise partly from the effect of war service on individual veterans and that they endeavor to give all reasonable consideration to any such special circumstances in the disposition of such cases. Of course, occasional mistakes may occur but we believe the following statement in the circular letter of the Administrative Committee of the District Court to all the judges, clerks, and probation officers of those courts under date of July 30, 1945 states the sound view and reflects the general practice:

> "We deem it proper and appropriate to suggest to the various court officials that they take particular pains in the investigation and disposition of cases of returning service men. There will doubtless be a substantial number of individual cases where the experience of the parties involved should be taken into consideration in determining their responsibility. On the other hand, the fact of service should not in and of itself permit defendants to escape responsibility for criminal acts."

The question whether some sort of advisory board should be created to assist courts in connection with sentences in general is a part of the general subject matter of H. 68 and S. 478 referred to the Council and discussed later in this Report.

We do *not* recommend the passage of the bill.

House 66 Relative to "Forthwith" Sentences

(Referred to the Council by Resolves Chapter 32)

An Act Relative to the Sentencing of Persons who are Convicted of Certain Crimes and are Under Sentence of Imprisonment in the Massachusetts Reformatory

> Section twenty-eight of chapter two hundred and seventy-nine of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by adding at the end the following: — "No sentence of imprisonment shall be imposed under this section in the Massachusetts reformatory, notwithstanding the provisions of section thirty-one."

This bill was introduced by the Commissioner of Corrections for the reason stated in paragraph 8 of that part of his report for the year 1944 printed as House 58 as follows:

> "Due to the fact that some of our courts have applied the 'forthwith sentence' to be served at the Massachusetts Reformatory, it is recommended that that

section of the law, chapter 279, be amended in order to prevent such a sentence being served at the Massachusetts Reformatory, an institution wherein a person is sentenced for an indeterminate period for reformation."

Section 28 thus referred to provided that:

"Section 28 — If a convict serving a sentence of imprisonment in the Massachusetts reformatory is convicted of a crime punishable by imprisonment in the state prison or house of correction, the court may impose sentence of imprisonment *therein* and may order it to take effect *forthwith*, notwithstanding the former sentence. The convict shall thereupon be removed accordingly, and shall be discharged at the expiration of his sentence thereto. (1891, 200; R. L. 220, s 24.)"

This statute as indicated by the reference in the parenthesis as appearing in the General Laws was first adopted as chapter 200 of the act of 1891 which reads as follows:

"When a prisoner serving a sentence in the Massachusetts reformatory is convicted of an offence punishable by imprisonment in the state prison or house of correction, the court may impose *such sentence of imprisonment in the state prison or house of correction as is authorized by law*, and may order that the same take effect *forthwith* notwithstanding the former sentence, and the prisoner shall be removed accordingly, and shall be released at the expiration of said last named sentence."

The wording of the present section 28 above quoted while abbreviated, did not in any way change the substance of the original act of 1890. The word "therein" in section 28 means the same as the longer clause in the original act, and shows that only a sentence *and removal* to state prison or house of correction of one already in the reformatory is to be *substituted* for the reformatory sentence and terminate it.

Section 31 provides that

"A male under thirty years of age, not previously sentenced for felony more than three times, convicted of a crime punishable by imprisonment in the state prison or in a jail or house of correction may be sentenced to the Massachusetts reformatory. District courts and trial justices shall have the same jurisdiction to sentence such person to said reformatory as they have to sentence him to such jail or house of correction."

Section 32, however, provides that —

"The court imposing a sentence of imprisonment in the Massachusetts reformatory shall not fix the term thereof unless it exceeds five years, but shall merely impose a sentence of imprisonment therein; but prisoners may be received and held therein who have been sentenced thereto by a court of the United States for a fixed or limited term."

While these statutes originated at different dates they were all re-enacted in 1921 in the General Laws and must be construed together and under them the only sentence to the reformatory pro-

vided for unless it is for more than five years is an indeterminate one whether the man is already there or not. The sentence being to the reformatory without fixed term.

Section 33 fixes the maximum for different offences as follows:

> "Whoever is sentenced to the Massachusetts reformatory for larceny or for any felony may be held therein for not more than five years unless sentenced for a longer term, in which case he may be held therein for such longer term; if committed to said reformatory as a delinquent child he may be held therein for not more than two years; if sentenced to said reformatory for drunkenness he may be held therein for not more than one year; if sentenced to said reformatory for any other offence he may be held therein for not more than two years."

There is no provision in the statutes under which the court can substitute a later sentence to the reformatory for a prior one and terminate the prior one as can be done by what is known as a "forthwith" sentence to some other institution under section 28 above quoted. There are 32 justices of the superior court and 150 or more justices and special justices of district courts all having authority to sentence to the reformatory. There appears to be some difference of opinion as to whether a second or third "forthwith" indeterminate sentence to the reformatory can be imposed which will terminate a prior sentence "therein" and take its place. We find nothing in section 31 when construed with the other sections to authorize such a sentence but the difference of opinion causes difficulty and confusion in the application of the parole laws when it appears and possible application for a writ of habeas corpus, and it should be removed. All sentences under 5 years to the reformatory must be indeterminate.

Accordingly we recommend the passage of House 66.

House 368 Relative to the Penalty for Adultery

(Referred to the Council by Resolves Chapter 32)

This bill (the subject matter of which was referred to the Council by Resolves Chapter 32) would amend Section 14 of Chapter 272 of the General Laws by striking out the words "the state prison for not more than three years or in jail" so that the section as thus amended would read:

> "A married man who has sexual intercourse with a woman not his wife, an unmarried man who has sexual intercourse with a married woman or a married woman who has sexual intercourse with a man not her husband shall be guilty of adultery and shall be punished by imprisonment for not more than two years, or by a fine of not more than five hundred dollars."

The practical reason for this proposal which originated with the Board of Parole does not appear on the face of the bill. A statement

of statutory history is needed to explain the operation of the present law in practice as shown by the experience of the Board of Parole in dealing with women who are sent to the Reformatory for Women for this offence. The purpose of the bill is not to attempt to change the actual character of the offense, but, by changing a legal technicality, to carry out the reformatory principle for which the Reformatory for Women was established and developed as appears in the account of its history in Appendix F (pp. 99–106).

Ever since 1852 the statute (now section 1 of G. L. chapter 274) has provided that "a crime punishable by death *or imprisonment in the state prison is a felony.*"

The word "felony" in "common and statute law" is defined in the new Oxford Dictionary to mean "The general name for a class of crimes which may loosely be said to be regarded by the law as of a graver character than those called misdemeanors."

In the earlier English law it involved "a total forfeiture of either lands or goods or both besides other punishment (see Bouvier's Law Dictionary, citing Blackstone and others). In American common law "the word has no clearly defined meaning" but it is defined by statute in many states.

In Massachusetts the meaning of the word in the statute quoted above is involved in the rather curious history of the meaning of the constitutional phrase "infamous punishment." The story is told in detail in two articles in the Massachusetts Law Quarterly (Vol. VI No. 5, August, 1921, pp. 214–245 and Vol. VII No. 2, January, 1922, pp. 91–107). Since 1857 there has been a distinct change in public opinion in the direction of "correctional" rather than "infamous" punishments as this latter term was formerly understood. This has been recognized by the legislature ever since 1911 when chapter 176 of that year extended the jurisdiction of district courts to "felonies punishable by imprisonment in the state prison for not more than five years," but provided that those courts should not impose a sentence to state prison and also limited the term of imprisonment in a jail or house of correction. Accordingly most of the "felonies" are not "felonies" (so far as punishment is concerned) but are "felonies" *only in name* because of the somewhat arbitrary definition of the word based on the possibility of a state prison sentence *if the case is prosecuted in the superior court on indictment;* but *not if it is in the district courts or in the superior court on appeal from the district court.*

Such being the variable meaning of the word in practice we reach the problem presented by House 368.

As already indicated by the words above quoted which House 368 would strike out, section 14 of chapter 272 provides a *possible* punishment for adultery of "imprisonment in the state prison for not

more than three years." Only the superior court can sentence to the state prison, but by the Act of 1911 already mentioned, this offense being punishable in state prison for not more than three years is within the jurisdiction of the district courts where it is *not* a "felony" except in name, or, in other words, a minor "felony." And in actual practice it is dealt with by the courts by variable sentences applicable to misdemeanors. The figures in the note on p. 68, as to sentences for this offense in 10 years show only one sentence to the state prison. All the other sentences of men range from a fine or a few days to one year in some other institution, and, as appears from a memorandum received from the Board of Parole, the majority of them in five years "received a fine or a *suspended* sentence." On the other hand there are about a dozen or more women each year who are sent to the Reformatory for Women. This means an indeterminate sentence of five years under Sections 17, 18 and 19 of chapter 279 simply because it is a technical "felony." This means that a woman once sent to the Reformatory for adultery is sometimes really committed for *more than 5 years* because she is always classed as an adulteress, when released, even if any subsequent breach of parole is merely alcoholic in character.

We do not think a law based on a purely technical legal definition, which produces such results in practice is either just or healthy. Its practical effect is obviously entirely opposed to the principle and purpose for which the Reformatory for Women has been developed. The *felonious* sentence to state prison is practically never imposed on anyone and the only effect of providing a possible sentence of 3 years in state prison is to obstruct (by a sense of unjust discrimination and discouragement) the chance of helping such women as are receptive of help and to provide unjust treatment of women as compared with men for the same offense. The facts illustrate the purely arbitrary character of the statutory definition of "felony" in this connection.

We believe that, instead of changing the technical description of the penalty, which is applicable to both men and women, it would be wiser to follow the action of the legislature in 1911 when it gave jurisdiction to the district courts of felonies punishable by no more than five years in state prison; but providing that the district courts could not impose a state prison sentence. One of the felonies thus transferred was the offence of adultery, the penalty for which is not more than three years in state prison, a sentence which is practically never imposed by any court. In the same way we think the best method of meeting the present situation is to change the length of the indeterminate sentence for this offence to the reformatory for

women from five to two years, as better adapted in practice (as shown by the experience of the parole board) to the reformatory purpose of the institution. We therefore recommend the following:

DRAFT ACT

Section 18 of chapter 279 of the General Laws is hereby amended by inserting after the word "felony" in the second line thereof the words "except adultery" and by inserting the words "including adultery" after the word "offence" in the fifth line thereof, so that the section will read

Section 18. A female sentenced to the reformatory for women for larceny, or any felony except adultery, may be held therein for not more than five years unless she is sentenced for a longer term, in which case she may be held therein for such longer term; if sentenced to said reformatory for any other offence, including adultery, she may be held therein for not more than two years.

For convenient reference and comparison, we annex in Appendix D a description of the penalties provided for this offense in all the other American states.

House 67 Relative to Additional Sentences to State Prison

(Referred to the Council by Resolves Chapter 32)

This bill would amend section 26 of the General Laws by striking it out and substituting the following:

"Section 26. A convict under sentence of imprisonment in the state prison may be further sentenced for a maximum term not longer than the longest term fixed by law for the punishment of the crime for which he has been convicted, and a minimum term not less than one year."

The bill was based on paragraph 9 of the report of the Commissioner of Correction (House 58) which reads:

"The original section 26 of chapter 279 of the General Laws does not provide for a maximum term of sentence. Section 24 of chapter 279 of the General Laws provides for a maximum and minimum term of sentence to State Prison. In that a sentence under section 26 now conflicts with section 24 of said chapter 279 of the General Laws, and has caused confusion in the application of the parole laws, I recommend that the further sentence of a convict in State Prison be for a maximum term not longer than the longest term fixed by law for the punishment of the crime for which he has been convicted, and a minimum term of not less than one year."

Discussion

Section 24 now provides that:

"If a convict is sentenced to the state prison, except for life or as an habitual criminal, the court shall not fix the term of imprisonment, but shall fix a maximum and a minimum term for which he may be imprisoned. The maximum term

shall not be longer than the longest term fixed by law for the punishment of the crime of which he has been convicted, and the minimum term shall not be less than two and one half years.

Section 26 now provides that:

"A convict under sentence of imprisonment in the state prison may be sentenced for a further time of not less than one year. (1880, 15 s 2; P. S. 215, s 21; R. L. 220, s 22.)"

These sections must be construed together. When a second sentence for one year or two years is imposed, there appears to be a difference of opinion as to whether it is a minimum or a maximum or both and whether it is a legal sentence. This causes confusion in applying the parole laws if it is imposed, with possibilities of a later petition for habeas corpus. The law should be clarified, as the commissioner suggested. We recommend the passage of House 67.

House 68 and Senate 478 Relative to Sentencing Convicted Persons

The commissioner of corrections in paragraph 10 of his report printed as H. 58 recommended the appointment of a special commission for the following purpose:

"In order to determine whether or not the courts should have the assistance of a 'treatment Tribunal' or a 'Sentencing Board' to assist them in the sentencing of those convicted of crime, and for a study of the sentencing and commitment laws to the penal institutions and the Massachusetts Training Schools and to provide for the proper places for the custody and the facilities for the education and reformation of those so sentenced or committed."

He then introduced a resolve (House 68) for that purpose. Thereafter the Committee on Judiciary reported a resolve (Senate 478) for a special commission.

"for the purpose of making an investigation and study of the laws of the commonwealth relating to the sentencing and committing to the various penal institutions in the commonwealth and the Massachusetts training schools of persons convicted of criminal offences. The commission shall particularly consider the advisability of establishing and maintaining a treatment tribunal or sentencing board to assist the criminal courts in a program of reformation and education and in the sentencing and committing of convicted persons to imprisonment or to the Massachusetts training schools, and shall ascertain whether the facilities provided by the counties and the commonwealth for the incarceration, reformation and education of persons convicted of crime are being fully utilized, and if not, in what way the same may be conveniently and advantageously used."

This proposed resolve (Senate 478) together with House 68, was then referred to the Judicial Council with several other bills, by resolves chapter 32 as follows:

"Resolved that the Judicial Council is hereby requested to consider the subject matter" of Senate 478 and House 68 "relative to the sentencing of persons convicted of crime."

We call attention to the fact that no specific bill was submitted, or referred to the Council, but the Council was requested to consider the general subject matter described in Senate 478 and House 68 (which were based on paragraph 10 above quoted of House 58). The reference and request, therefore, is for a general inquiry as to the practice of sentencing including the other somewhat general specifications in the two resolves thus referred.

This is a large subject which has been under discussion throughout the country since the appearance some years ago of a plan drawn up by the American Law Institute and the subsequent suggestions for the Federal system of the Conference of Senior Circuit Judges.

Opinions have differed sharply on the original proposal of the American Law Institute and other proposals have been suggested and are still being formulated by various bodies actively interested in the administration of the criminal law and criminology, and some of these persons wish to have an opportunity to submit their views to the Judicial Council for consideration.

We have obtained from the Director of the Administrative Office of the United States Courts in Washington the "Report to the Judicial Conference (of Senior Circuit Judges) of the Committee on Punishment for Crime." This report prepared by seven United States Circuit judges contains studies of the federal and state practices and the Borstal System in England and recommends a draft act for the federal system. The report was transmitted to Congress, after discussion by the Conference, by Chief Justice Stone and hearings were held before sub-committee No. 3 of the House Judiciary Committee on two bills H. R. 2139 and H. R. 2140 in June, 1943. The hearings and other communications were printed in Serial No. 4 of which we have a copy. We also have a letter from Henry P. Chandler, Esq., the Director above referred to as to the consideration of the report.

As the resolve referring this matter to the Council was adopted late in the current year, there has been no opportunity, in view of the other matters referred to the Council and under consideration, to study the material, to give persons having differing views on the subject an opportunity to submit their views to the Council, and to give the subject adequate consideration in time to cover the matter in the annual report this year. We respectfully request, therefore, that the matter be allowed to wait until the annual report in 1946.

House 939 Relating to Foreign Corporations Which Do Business in Massachusetts

(Referred to the Council by Resolves Chapter 20)

The purpose of this bill appears to be to bring within reach of the service of process upon the Commissioner of Corporations any foreign corporation "which does business in this commonwealth" which has not appointed the commissioner attorney to accept service as provided in § 3 of ch. 181 of the General Laws as amended by St. 1943 ch. 459, § 4. It would also cover the corporation doing business in Massachusetts which, because of its name, or the illegal character of its business, cannot appoint the commissioner attorney because, under § 6 the commissioner cannot accept such a power of attorney.

We see no objection to the purpose of bringing corporations which do business in Massachusetts within the reach of process as to business thus done in Massachusetts, but we do not think this bill is the way to do it.

We think the simplest and shortest way of accomplishing this object is not to amend § 3A as proposed by the bill, but to amend § 3 as heretofore amended by inserting the words "which does business in this commonwealth" after the word "corporation" in the first line so that that line shall read, "every foreign corporation which does business in this commonwealth or which has a usual place of business" etc., and by amending § 4 of said chapter by adding at the end thereof the following:

"In the case of service of process against a corporation which has not complied with § 3 or which is not allowed to comply with § 3 by § 6 of this chapter the notice herein provided for shall be mailed by the commissioner to the proper address of such corporation which shall be furnished to him by the plaintiff or his attorney."

Funds from Escheated Estates and Public Administrators

Former Attorney General Bushnell's report (P. D. 12) contained the following discussion with drafts of proposed legislation (pp. 166–169) all of which was referred to the Judicial Council by Resolves Chapter 19, with a request for a report.

Extract from former Attorney General Bushnell's Report:

Funds from Escheated Estates

"Property of deceased persons leaving neither kindred nor surviving spouse descends by way of escheat to the Commonwealth. G. L. (Ter. Ed) Chapter 194, Sec. 1, provides for the appointment by the Governor, for terms of five years, of "public administrators" for each County of the Commonwealth, not exceeding a limit of six in number for Suffolk or Middlesex and five in other counties.

"Much of the public's legal work cannot be measured in terms of dollars and

cents. Here is an example of measurable financial benefit to the public treasury as a result of quiet and little publicized work of one of the public's lawyers.

"The following amounts were turned over to the State Treasurer, for four years indicated, from escheated estates.

1941	$ 25,805.86
1942	42,060.90
1943	53,819.44
1944	82,851.37
Total	$204,537.57

"In my opinion, the successive annual increases are due largely to the work of Assistant Attorney General G. Bruce Robinson. Mr. Robinson was appointed by me in 1942, placed in entire charge of Public Administration, and shortly thereafter set about the task of drawing together information from the widely scattered sources which would enable him more effectively to see to it that money due the public treasury from this source was paid over.

"In 1943, the practice was established by Mr. Robinson of requesting copies from the public administrators of their inventories as filed in the Probate Courts, together with information as to the amount of bonds and the names of sureties. Whenever further information has been required to explain items not wholly clear to Mr. Robinson, he has not hesitated to exercise his authority to get it. Payments or proposed payments by way of funeral expenses out of proportion to the size of the estate as well as fees of public administrators have been the subjects of frequent inquiry.

"Assents to allowance of accounts has not been given as a matter of form. The result has been a noticeable increase in the number of public administrators consulting the Assistant Attorney General in charge concerning payments before accounts are drawn up. Money paid by public administrators, either to themselves as excessive fees or to other persons in amounts to which they are not entitled belongs to the public. These items individually are not extremely large, but the increased size of the annual balance of escheated estates paid to the Treasurer indicates that continued attention on the part of the Assistant Attorney General is extremely profitable in the aggregate.

"Assistant Attorney General Robinson's analysis of this work has disclosed estates pending from two to thirty-two years some of them without any record of activity after waiver by the Attorney General on the petition for appointment. Investigation of all of these estates was conducted by Mr. Robinson to the fullest extent possible in the time permitted. I suggest that this work be carried on to completion, the results already obtained showing the possibilities of returns to the Commonwealth as a result of conscientious effort.

"Draft of Amendatory Legislation Recommended in Public Administration

"1. Draft of further amendment to G. L. (Ter. Ed.) c. 194, s. 7, as amended by Acts of 1933, Chapter 100, as follows:

> " 'If, after the granting of letters of administration to a public administrator and before the final settlement of the estate, the husband, widow or an heir of the deceased, in writing, claims the right of admin-

istration or requests the appointment of some other suitable person to the trust, the Probate Court *after notice to the Treasurer and Receiver General by such claimant* may, in its discretion, grant letters of administration accordingly, or, if, after the granting of such letters to a public administrator, a will of the deceased is proved and allowed, said court shall grant letters testamentary or letters of administration with the will annexed. When the person to whom such letters are granted gives the bond required by law the powers of the public administrator over the estate shall cease.'

"2. Draft of enactment as a part of G. L. (Ter. Ed.) c. 167 of provision substantially as follows, is suggested:

" 'Any bank upon payment or transfer to any public administrator in his capacity as public or special administrator of funds deposited with or held by it or for the benefit of such administrator's intestate shall notify the Treasurer and Receiver General of such payment or transfer.'

"and, as a part of G. L. (Ter. Ed.) c. 175, as follows:

" 'Any company upon payment or transfer to any public administrator in his capacity either as public or special administrator of funds or property held by it for the benefit of such administrator's intestate or his estate shall notify the Treasurer and Receiver General of such payment or transfer.'

"3. Draft of enactment suggested as part of G. L. (Ter. Ed.) Chap. 193:

" 'A special administrator of the estate of a person who dies intestate within the Commonwealth or elsewhere leaving property in any county of the Commonwealth to be administered, if there are no known husband, widow or heirs of such deceased living in the Commonwealth at the time of the filing of the petition, shall notify the Treasurer and Receiver General of his appointment when such is made and give him due notice of all subsequent proceedings.' "

Discussion of the Recommendations

1. The first draft act would insert in G. L. (Ter. Ed.) c. 194, s. 7, the words "after notice to the treasurer and receiver general by such claimant," in case after the granting of letters of administration to a public administrator, an heir, spouse or executor seeks the right to administer. Inasmuch as the granting of such petition ends the claim of the state to an escheat, notice to its fiscal officer is a reasonable requirement. *We recommend passage.*

2. We do not recommend the second draft to provide that savings banks and life insurance companies be required to notify the state treasurer of payments to a public administrator. It is a partial remedy, and does not include such payments by trust companies, cooperative banks, fraternal benefit associations, and private debtors to the deceased. Looked at as only an entering wedge, it may be remarked that the public is already much over-

burdened with the duty of making reports. These are funds of the public and public officials should collect them. So far as legislation is concerned, the public interest in escheated estates is adequately protected. Public administrators, appointed by probate courts, must give bond, conditioned among other things to file an inventory in three months, and to file annual accounts. It would seem plain that a failure to conform to these requirements constituted a "breach of duty" disclosed by the records of the probate registry, requiring notice to the Attorney General and the District Attorney for the county, as provided by G. L. c. 194, s. 16. We find on inquiry, however, that such notices are sent only by some of the registers of probate. Notice is given of the petition for appointment and of the actual filing of an account. What is needed, if anything, is a remedy for inaction. It might clarify the duties of probate registers to add to section 16 the words "including any failure to file an inventory or account." We recommend the following:

DRAFT ACT

Section 16 of chapter 194 of the General Laws (as appearing in the tercentenary edition thereof) is hereby amended by adding at the end of the last sentence the words "including any failure to file an inventory or account," so that the last sentence shall read: "Each register of probate shall forthwith notify the proper district attorney and the Attorney General of any breach of duty on the part of a public administrator in relation to any estate under his charge, of which such register has knowledge or which the records in his registry disclose *including any failure to file an inventory or account.*"

3. As to the third proposed draft to require notice to the State Treasury by a special administrator of his appointment and subsequent proceedings "if there are no known husband, widow or heirs — *living in the Commonwealth.*"

We see no objection to the requirement of such notice but we do not understand why either a special administrator or a public administrator should be appointed under clause 4th of sections 1 and 4 of chapter 294 *merely* because there are "no husband, widow or heirs or next of kin *within* the commonwealth. Such persons, if known, even if outside of the Commonwealth, if suitable, seem entitled to be considered for appointment under sections 1 and 2 of chapter 193 before a public administrator. If such next of kin are known to exist anywhere there is no escheat and no occasion for a public administrator. Accordingly we recommend the following:

DRAFT ACT

Clause 4th of section 1 of chapter 193, and section 4 of chapter 194 of the General Laws are hereby each amended by striking out the words "in the Commonwealth" where they appear.

As to the proposed notice by a special administrator in the third recommendation above quoted, we think the words "in the Commonwealth" should be struck out before its passage. The proposal does not specify the section of chapter 193 to be amended but we suggest that if enacted it should be added as a second paragraph of section 10.

CHARITABLE TRUSTS

Certain Recommendations in the Report of the Attorney General (P.D. 12)

(*Referred to the Council by Resolves Chapter* 19)

Former Attorney General Bushnell in his report, after an extended discussion of questions arising in connection with the functions of the office of attorney general relative to "charitable" trusts in which there is a public interest (see pp. 146–164), closes his discussion as follows:

> The following amendments are recommended and draft legislation is set forth below.
>
> 1. *Establishment of a Division of Public Charities with adequate personnel and funds.*
>
> 2. *Enactment of a statute requiring notice to the Attorney General of all judicial proceedings affecting in any manner public charities or trustees of charitable trusts.*
>
> 3. *Enactment of a statute authorizing examination of records and documents of trustees of charitable trusts and requiring attendance and testimony of witnesses.*
>
> 4. *Enactment of a statute requiring Registers of Probate to send Notice of Public Charities to Division of Public Charities.*
>
> 5. *Enactment of a statute requiring trustees and charitable corporations to file annual reports with the Division of Public Charities.*
>
> *As to the location of the Division of Public Charities* — I have with some hesitation suggested that it be placed in the Department of the Attorney General. My first inclination was to suggest that such a Division be set up within the Department of Public Welfare because of the reference to that department in the statutes quoted. I found, however, that the Department of Public Welfare had little workable machinery which could be applied to the administration of charitable trusts. Mr. Rotch, the Commissioner informs me that he does not believe any such supervision of trustees as that contemplated should be in that department, and that the information called for by questionnaires to charitable corporations by his department should easily be supplied out of information that a Division of Public Charities would assemble and there would be no need for duplication. We considered also the Department of Banks and others but came back to the view that the legal duties of the Attorney General with respect to charitable trusts required so close a relationship to such an administrative body as the new Division of Public Charities that it seemed to belong there.

However, the important thing is to set up the Division and equip it with adequate funds and personnel. The question as to where it should be placed is secondary.

With the Division set up, properly staffed and aided by the supporting statutes, the Commonwealth would be for the first time in its history approaching "proper administration of the laws" of Charitable Trusts.

AMENDMENTS SUGGESTED BY THE ATTORNEY GENERAL

1. An Act Providing for a Division of Public Charities.

Section 1. General Laws, chapter 12, is hereby amended by inserting after section 11 the three following sections: —

Section 11A. There shall be in the Department of, subject to the control of, the Attorney General a Division for the supervision and enforcement of the due application of funds given or appropriated to public charities within the Commonwealth and for the prevention of breaches of trust thereof. *The Division shall be known as the Division of Public Charities.*

Section 11B. The executive and administrative head of the Division of Public Charities shall be the Director of Public Charities. The Director shall be appointed by the Attorney General for a term of seven years. He shall be qualified by training and experience to perform the duties of his office and shall receive such salary, not exceeding seven thousand dollars per year, as the Governor and Council may determine.

Section 11C. The Director may appoint and remove, subject to chapter 31 of the General Laws and the rules and regulations made thereunder, such accounting, legal, investment, clerical and such other experts and assistants as the work of the Division may require. The Director may also, from time to time, engage experts for assistance in any specific matter at a reasonable rate of compensation and not subject to said chapter 31.

2. An Act requiring the Attorney General to be notified of judicial proceedings affecting public charities or trustees of charitable trusts.

The Attorney General shall be notified of all judicial proceedings affecting or in any manner dealing with a public charity within the commonwealth or affecting or in any manner dealing with a trustee who holds in trust within the commonwealth property given, devised or bequeathed for benevolent, charitable, humane or philanthropic purposes, and who administers or is under a duty to administer the same in whole or in part for said purposes within the commonwealth, and shall be deemed to be an interested party thereto.

3. An Act authorizing the examination of the records and documents of trustees of charitable trusts and requiring the attendance and testimony of witnesses.

Chapter twelve of the General Laws is hereby further amended by adding thereto the following new section: — *Section 8B.* The Attorney General may examine the books, accounts, vouchers, records contracts and all other documents which are in any manner concerned with or a part of the trust of any trustee who holds in trust within the commonwealth property given, devised or bequeathed

for benevolent, charitable, humane or philanthropic purposes, and administers, or is under a duty to administer, the same in whole or in part for said purposes within the commonwealth, and the books, accounts, vouchers, records, contracts and all other documents of corporations which are incorporated for benevolent, charitable, humane or philanthropic purposes.

In the course of making such examination and for the purposes thereof the Attorney General may require the attendance and testimony of witnesses. Witnesses shall be summoned in the same manner and paid the same fees as witnesses before the Superior Court.

This section shall not be construed to compel any person to give any testimony or to produce any evidence, documentary or otherwise, which may tend to incriminate him.

4. AN ACT REQUIRING THE REGISTERS OF PROBATE TO SEND NOTICES OF PUBLIC CHARITIES TO THE DIVISION OF PUBLIC CHARITIES.

Section 19 of Chapter 217 of the General Laws is hereby amended by striking out in the fourth line the words "Department of Public Welfare" and inserting in place thereof the words "Division of Public Charities," so as to read as follows:

Section 19. Whenever any instrument creating or increasing an estate of fund for benevolent, charitable, humane or philanthropic purposes is filed for record in a registry of probate, the register shall forthwith send to the division of public charities a statement setting forth the book and page in the registry where the instrument is recorded, with the name, if any, of the estate or fund, and further stating by whom said estate or fund has been created or increased, and by whom it is to be administered.

5. AN ACT REQUIRING CERTAIN TRUSTEES AND CHARITABLE CORPORATIONS TO FILE ANNUAL REPORTS WITH THE DIVISION OF PUBLIC CHARITIES.

Section 15 of Chapter 68 of the General Laws, as amended by Chapter 209 of the Acts of 1930, and as amended by Chapter 42 of the Acts of 1931, is hereby amended by striking out the said section and inserting in place thereof a new section, so as to read as follows: —

Section 15. Every trustee, incorporated or unincorporated, except a charitable corporation subject to section twelve or twelve A of chapter one hundred and eighty or expressly exempted in said section twelve A from the provisions thereof, who holds in trust within the commonwealth property given, devised or bequeathed for benevolent, charitable, humane or philanthropic purposes and administers, or is under a duty to administer the same in whole or in part for said purposes within the commonwealth shall annually, on or before November first, make to the division of public charities a written report for the last preceding financial year of such trust, showing the property so held and administered, the receipts and expenditures in connection therewith, the whole number and the average number of beneficiaries thereof, and such other information as the division requires, provided, that if any such trustee is required by law to file an account with the probate court, said division shall accept a copy thereof in lieu of the report hereinbefore required.

Every charitable corporation, whether or not it is also required to file a report with the department of public welfare under the provisions of said sections twelve or twelve A of said chapter one hundred and eighty, shall annually, on or before

November first, make to the division of public charities a written report for its last preceding financial year, setting forth in detail information regarding each individual gift held by it for special purposes or for its general purpose, including the amount of each such individual gift, the name of the donor thereof, the purpose for which the gift was made, the amount expended therefrom, during the period covered by the report, and the purposes for which such expenditure was made: provided that no such report need be filed by such a corporation as to gifts to it of less than one thousand dollars.

Failure for two successive years to file any report required by this section shall constitute a breach of trust within the meaning of section eight of chapter twelve, and thereupon the attorney general shall take such action as may be appropriate to compel compliance with this section.

By Resolves chapter 19 the General Court requested the Judicial Council

"to investigate the subject matter of so much of the report of the attorney general for the fiscal year ending June thirtieth, nineteen hundred and forty-four (Public Document, No. 12) as relates to requiring notice to the attorney general of all judicial proceedings affecting in any manner public charities or trustees of charitable trusts, so much thereof as relates to authorizing examination of records and documents of trustees of charitable trusts and requiring attendance and testimony of witnesses, so much thereof as relates to requiring registers of probate to send notice of public charities to the division of public charities, so much thereof as relates to requiring trustees and charitable corporations to file annual reports with the division of public charities."

DISCUSSION OF RECOMMENDATIONS

These proposals raise broad questions of policy.

On page 148 of the report it appears that the survey made some years ago by former Attorney-General Dever with the assistance of a federal W.P.A. appropriation, showed 26,451 or more "bequests" for charitable purposes had been made in Massachusetts up to the year 1935. On page 150 it appears that trusts for the "purposes of education, religion, public improvements, etc., constitute a large proportion of all the charitable trust funds." It also appears that trust funds "for benevolent, charitable, humane, or philanthropic purposes" are now required, by Section 15 of Chapter 68, to report annually to the department of public welfare "showing the property so held . . . the receipts and expenditures . . . the whole number and the average number of beneficiaries thereof, and such other information as the department requires." The report also states that "in practice the statute has been construed in the main, although no authority seems to exist for the interpretation, as requiring reports only from trusts "within the word 'charitable' which includes aid to the poor and sick, the widows, the aged, and the orphans" and does not include

"education, religion, public improvements, etc." already mentioned as constituting a large proportion of the known trusts.

Now, as we read the proposed amendments (and we do not wish to exaggerate) they would set up a "division" for the constant annual supervision of all the 26,000, or more, trusts "for benevolent, charitable, humane or philanthropic purposes" (interpreted, perhaps, by some future official to include "education, religion, etc." contrary to the present practice above stated); and that all these trusts (incorporated or not) would be required to file annually, not only the reports now called for from strictly "charitable" trusts by Section 15 of Chapter 68, but, *if incorporated*, also a detailed report as to "each gift of $1,000 or more held by it, including the amount, the name of the donor, the amount expended, and the purposes of such expenditure" and "such other information" as the new *expanded* "division of public charities" *"requires"* and that "the Attorney-General shall be notified of all judicial proceedings affecting, or in any manner dealing with," any of these 26,000, or more, very variable trusts; and that he "may appoint such accounting, legal, investment, clerical and such other experts and assistants *as the work of the division may require*," and may "examine books, accounts, vouchers, records and all other documents . . . in any manner concerned with or a part of the trust of any trustee" and may summon and require the attendance and testimony of witnesses in his office as they may be summoned before the Superior Court. All of these things are specified in the five proposed acts, quoted at the beginning of this report, when read together.

If this is not a new "bureau" of enormous size and scope of authorized activities, capable of practical expansion of assumed power with all the possible, conceivable, and proverbial "insolence of office" which the imagination of some *future* officials in the department may suggest we do not know what it is. We do not believe that any such inquisitorial establishment of official "super-trustees" or permanent, official "guardians ad litem" for all the religious, educational, and charitable institutions in Massachusetts should be created, or imposed upon the taxpayers of Massachusetts, most of whom have only very indirect or remote interests in most of the trusts. Because some trusts have been found to need the attention of the Attorney-General in the public interest, we see no reason why the 26,000, or more, should be subjected to this interminable, and very probably in future, intolerable interference and burden of reports and inquisitions. While appreciating the sincerity of the recommendations, we see no reason for believing that public charitable trusts in general are not properly administered by the trustees *to whom the creators of the trusts assign their administration*. We believe that the responsible experienced governing bodies of our colleges, our hospitals, and the

many various religious establishments in Massachusetts are more competent, in the long run, to manage their institutions and carry out the terms of their trusts as the donors intended them to, including, in general, the public aspects of the trusts, without filling the State House with reports, and reports, and reports, than any group of public officials, however able, who might be selected from time to time for the proposed division.

These remarks are made not as a criticism of any attorney-general, past or present, or of his assistants in charge of these matters. They are made as to the possible future, and reflect old and seasoned views which have always been, at least until recent years, part of the "fundamentals" of the American philosophy of government. A chapter on "bureaucracy," in Carr's book "Concerning English Administration Law," begins with an old Burmese proverb — "Three major calamities, fire, flood and officials." One of the wisest of New England lawyers of more than a century ago — Jeremiah Mason — is said to have remarked, of public officials generally, that "experience showed that, sooner or later, they stretched their powers to the utmost." We do not think the citizens of Massachusetts need illustrations of the accuracy of this remark after the experiences of the past ten years or so; but it was strikingly emphasized by former United States Attorney-General Mitchell in his address on the occasion of the 250th anniversary of the Supreme Judicial Court in 1942. From his own experience in public office, he said that he, himself, as Attorney-General had felt the need of exercising constant self-restraint in the administration of his office, and then pointed out that "the tendency is sometimes the other way . . . that there are signs that the tradition is fading" in favor of "the tendency of government representatives to overpower the citizen; to consider the government always right, and the citizen wrong" etc.

No estimate of the cost to the commonwealth of the proposed division is contained in the report. The suggestion is that it should have "adequate personnel and funds." In view of the suggestion already referred to that the trusts, described by certain broad adjectives, should include all trusts relating to "education, religion," etc., the proposal would seem to be the creation of, or translation of the office of Attorney-General into, a perpetual public trustee of all funds given for any purpose in which there is any conceivable public interest however limited in scope, and that this public trustee should have an office force adequate to supervise the property, management, investment, and application of all the funds given to any institution of the character suggested. The community has become familiar, in recent years, with the common human impulse, conscious or unconscious, gradually to extend the functions of officials in the direction of bureaucratic detail to the point of exaggeration. In

view of this fact we wish to state what the proposed language seems to mean, or is capable of meaning in the minds of future administrators of such a "division."

We think these human facts should be considered in advance. Now granting the public interest in these so called "charitable" trusts, just what is their nature in relation to this question of organizing a permanent government supervising force who may, conceivably at least, in future consider themselves "super-trustees."

We think the fundamental trouble with the proposals is a sincere but exaggerated misconception of the nature and extent of the necessary and proper functions of the office of Attorney-General as the *representative* of the public interest in these trusts.

The office of Attorney General in Massachusetts has had a curiously variable history. There were no lawyers in Massachusetts in the 17th century in the sense of trained men; there were "attorneys" who were engaged in other occupations and represented people under powers of attorney. This continued until the first quarter of the 18th century when conditions required trained lawyers. The office of attorney-general is an old common law office, but was not established in Massachusetts until about 1686 — during the administration of Governor Andros — when an apothecary named Bullivant was appointed. The first lawyer appointed, about 1702, was Paul Dudley, later chief justice. The duties of the office were not then, and never have been, very clearly defined. During the 18th century, until the constitution was adopted in 1780, there was a running controversy between the governor and the legislature as to who should choose the attorney-general. Sometimes he was appointed by the governor, and sometimes elected by the legislature, in accordance with the temporary political turn of affairs. In 1767 the office of Solicitor-General (also an old office) was provided for, so that there were two law officers. The Constitution of 1780 (Chap. 2, Section 1, Article 9), recognized the common law character, and possible need, of both offices, and settled the controversy as to their selection by providing that they should be appointed by the governor with the advice and consent of the council. The question as to whether either of the offices should exist was left to the legislature. For 20 years after the constitution was adopted we had an attorney-general, but no provision was made for a solicitor-general, until 1802, when the work called for another officer and the solicitor-general was provided for, as explained by William Sullivan — one of the leading lawyers of his day — in the "Debates of the Constitutional Convention of 1820" p. 488.

The office of Solicitor-General was abolished by Chapter 130 of 1832 which established the Office of Attorney-General with "all the powers and privileges, and subject to all the duties by law belonging to said office."

This provision was soon changed in the Revised Statutes of 1836 which omitted reference to the general powers.

In the report of Attorney-General Austin in 1837 appeared the passage referred to by Mr. Bushnell at the beginning of his report which indicated that he did not consider that he had any general powers, and suggested without urging that he be provided with *some functions* as to charitable trusts.*

In 1843 the legislature abolished the office of attorney-general, distributing some of his functions to the district attorneys, additional ones to the district attorney of Suffolk County and leaving other unspecified functions in the air. This situation continued, as explained by Chief Justice Shaw in *Parker* v. *May*, 5 Cushing 336, until 1849

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*Extract from Section 8 of Chapter 130 of 1832

"Be it further enacted, That the Governor, by and with the advice and consent of Council, shall appoint and commission some suitable person to be Attorney General for the Commonwealth, with all the powers and privileges, and subject to all the duties by law belonging to said office. And the said Attorney General shall appear, and act for the Commonwealth, in the Supreme Judicial Court, when holden by three or more justices thereof, in all prosecutions for crimes which are or may be punishable with death; and in the trial and argument, in said court, of all causes, criminal or civil, in which the Commonwealth may be a party to the record or be interested, and when any question of law shall be tried or argued. And when thereto required by the Governor, or either branch of the Legislature, he shall further appear and act for the Commonwealth, in any court or tribunal of competent jurisdiction, in any other causes, criminal or civil, in which the Commonwealth may be a party to the record, or be interested."

Extract from Report of Attorney General Austin, in 1837 (p. 24)

"Another subject in this connection may be deemed worthy of attention.

"Large sums of money have, from time to time, been given or devised to corporations in this State, in trust for specific purposes of education or charity. It has been suggested in some cases by persons having an interest in those funds, that some of them are not employed at all, and others misappropriated by mistake or design, and it is believed that in such cases the Commonwealth is the proper party to interfere in its visitorial character as sovereign, and that the proper process is by Information to be filed by the Attorney General in the Supreme Judicial Court.

"Intimations have been given to me that this process is required.

"If the subject is important and extensive, as has been supposed, it will require the authority of the Legislature to determine, under what circumstances inquiry should be made. No such Information can be filed until proper means have been taken to ascertain the facts, and none are at present provided by which they can be verified."

Sections 1, 3, and 8 of Chapter 186 of 1849

"SECT. 1. There shall be an attorney General of this Commonwealth, to be appointed and commissioned by the governor, with the advice and consent of the council, in the manner prescribed by the constitution, who shall have, hold, and exercise, all the powers and duties by law appertaining to that office in this Commonwealth."

"SECT. 3. The attorney general shall also, when required by the governor, or either branch of the Legislature, appear for the Commonwealth, in any court or tribunal, in any other causes, criminal or civil, in which the Commonwealth may be a party, or be interested."

"SECT. 8. The attorney general shall see that all funds given and appropriated to public charities within this Commonwealth, are duly applied to their respective objects; and he is hereby authorized and required to use all lawful process to prevent the misapplication thereof, and to apply all lawful remedies to the correction of abuses, and breaches of trust, in the administration of the same, and shall further see that such corporations as are bound by law to make returns to the Legislature, shall comply with the requisitions of law in that respect."

As pointed out in the report this section was much abbreviated and modified in detail in the General Statutes of 1860.

when the legislature again decided that the office was needed and re-established it to hold and exercise "all the powers and duties by law appertaining to that office *in this commonwealth.*"

This act of 1849 for the first time specified functions as to charitable trusts in Section 8 as follows:

> "The attorney general shall see that all funds given and appropriated to public charities within this Commonwealth, are duly applied to their respective objects; and he is hereby authorized and required to use all lawful process to prevent the misapplication thereof, and to apply all lawful remedies to the correction of abuses, and breaches of trust, in the administrations of the same, and shall further see that such corporations as are bound by law to make returns to the Legislature, shall comply with the requisitions of law in that respect."

In Chapter 14 of the General Statutes of 1860 no general powers of the office were referred to and the clauses about charities in the Act of 1849 were noticeably abbreviated to the following:

> Section 20. "He shall enforce the due application of funds given or appropriated to public charities within the state, prevent breaches of trust in the administration thereof, and when necessary shall prosecute corporations which fail to make to the legislature the returns required by law."

Meanwhile, the office had become an elective office by constitutional amendment, and these general specifications of 1860 have continued since that time. Among them, as they now appear in Sections 1–11 of Chapter 12 of the General Laws, Section 8 provides that:

> "He shall enforce the due application of funds given or appropriated to public charities within the Commonwealth and prevent breaches of trust in the administration thereof."

As stated in the Attorney-General's report, this Section 8 describes certain common law functions incident to the office.

In the performance of these functions, which are broader than the brief specification of Section 8, it was the practice as appears in a number of opinions cited in the notes to Chapter 12 in the Annotated Laws for the Attorney General to appear as representing the public interest in connection with trusts having a public aspect, when the need of his appearance was called to his attention. While he has the authority and function of initiating legal proceedings, not only under Section 8, but under his general authority, in equity since the early restrictions on equity were removed in 1877, we find nothing in the history of the office in Massachusetts to suggest the constant perpetual detailed supervision of every trust with inquisitorial functions. The opinions of the supreme judicial court in a considerable number of cases of which *Carey Library* v. *Bliss*, 151 Mass. 364 is a

leading one, recognized the fact that the management of trusts is primarily a matter for the donor to decide, and this appears to be recognized in the opinion of Chief Justice Rugg in *Eustin* v. *Dickey*, 240 Mass. 55, referred to by the Attorney General on page 158 of his report, where the jurisdiction of the court to act in the matter of the removal of a trustee of the Christian Science Church was said not to require the presence of the Attorney General as a party, as "the public interests must be directly and essentially, rather than remotely and accidently, involved as to some distinct issue" to call for the appearance of the attorney general. The same appears to be true in regard to such matters as the probate of a will and the appointment of an executor where the will contains a trust with a public aspect. Until within very recent years we understand that it was never the practice to notify the Attorney General of a petition for the probate of a will, or the appointment of an executor thereunder, the obvious reason for this practice of a century or more, being that the public interest in that proceeding was too remote to require notice to the Attorney General, and consequent delay in the settlement of a private family estate, to require such notice and appearance unless some special issue appeared; and, in such case, as in others, the Attorney General could be notified and could appear by petition to intervene. We believe this seasoned practice to represent the common law of Massachusetts as to the nature of the functions of the Attorney General and we do not think that the use of the word "shall" in Section 8 already quoted enlarges, or alters, this function to the point of requiring an inquisitorial establishment such as is suggested. The word "shall" is used in a variety of different senses in the statutes, and it is not necessarily a mandatory word in regard to details. It has recently been pointed out that in one section (61) of Chapter 60 the word "shall" is used nine times with varying meanings (See M. L. Q. Oct. 1945, 42). Accordingly, we understand Section 8 of Chapter 12 merely to describe part of the *authority* of the office, and not to place upon the office mandatory duties which call for any such burden on the taxpayers as would be involved in the conception of the functions of the office indicated in the Attorney General's report.

We believe that sooner or later any issue calling for representation of the public interest by the Attorney General will come to his attention on complaint of someone interested or familiar with the particular trust, on petition for instructions, or for a variation of the specific purposes of a trust within its general public purpose in case the specific purposes cannot be carried out, under the doctrine known to lawyers as "cy pres" (which is a limited doctrine within the jurisdiction of the court of equity), *or in some other way*. These trusts with a public aspect may vary in all kinds of ways from the support

of an old ladies' home in a particular town, or a gift to some private school, or some particular church, to the protection of wild birds, or for the education of persons named Smith, Jones, or Robinson in a particular locality, or for the teaching of history in some institution, or for the study of whether Bacon wrote Shakespeare for the information of the community, or whatnot. The "public" interest in many of such purposes so far, not only as the taxpayers, but, also, of the general public whether taxpayers or not, is concerned, are very limited, indirect, and remote, and do not, in our opinion, justify the establishment proposed at the public expense. The Attorney General refers to the fact that in England in the middle of the 19th century, the Charity Commissioners of England and Wales were created with broad powers of supervision, including, we understand, powers of changing the management of the trust in ways which would be unconstitutional in Massachusetts under the case of *Carey Library* v. *Bliss*. The acts of parliament in regard to the subject are referred to in Tudor on "Charities and Mortmain." The fact of these arrangements in England do not persuade us that a similar centralized establishment should be adopted here where conditions differ as well as history.

In reporting on these proposals and on this broad question within the time available we have expressed, at some length, our view not only of the history of the subject, but of what we believe to be the "common law" "*within this commonwealth*" (the phrase used in the first section of the act of 1849 relating to the Attorney General). While the early English cases in regard to the attorney general's function as to charitable trusts since they were recognized as legal in the reign of Queen Elizabeth, (as pointed out by Chief Justice Shaw in *Parker* v. *May*, already cited) are referred to by our courts as illustrating common law functions of the office, they illustrate the general authority of the office to represent the public on specific issues, in our opinion, rather than a mandate for general, permanent inquisition.

While we have expressed our judgment on the matter of policy, as requested by the legislature, we have already pointed out that the office of attorney general is within the regulation of the legislature which can either abolish it, or specifically expand its functions in the manner suggested by the Attorney General, if the legislature does not agree with our judgment in the matter. In the exercise of that judgment, for the reasons stated, we do not recommend any of the five proposals stated in the report.

Notice to Beneficiaries to be Given by Executor after Appointment

It has come to our attention that in some cases the beneficiary of a charitable bequest under a will has not received notice of the bequest except by accident a considerable period of time after the allowance of the will. In Maine there is a statute (Revised Statutes of Maine 1930, c. 75, § 25, p. 1160) which provides that the register of probate within thirty days after the allowance of the will shall notify by mail all beneficiaries under the will that bequests have been made to them stating the name of the testator and executor or administrator with the will annexed and that the beneficiaries may obtain copies of so much of the will as relates to them on payment of a fee of fifty cents or more if the passage is more than ten lines. We assume that it is the common practice of an executor to notify, within a reasonable time, persons named as beneficiaries, but we think that it should be made his specific duty to do so. We see no reason why this burden should be placed upon the registers of probate at the public expense. We think it should be a natural function of the executor in administering the estate. Accordingly, we recommend the following:

DRAFT ACT

Within three months after the allowance of a will and the appointment and qualification of an executor, it shall be the duty of the executor to notify by mail the devisees and legatees named in the will whose addresses are known to him that devises, legacies or bequests have been made to them and to file in the Probate Court an affidavit showing the names of those notified and the addresses to which notices were mailed. In case an administrator with the will annexed is appointed he shall have the same duty unless it has already been performed by an executor.

House 1128

(Referred to the Council by Resolves Chapter 26)

This bill entitled

"An Act to Prevent Encroachment upon the Authority and Jurisdiction of the Commonwealth in Respect to Certain Proceedings against Tenants of Premises Occupied for Dwelling Purposes."

would provide that

Proceedings for the termination of any tenancy of premises occupied for dwelling purposes, other than a room or rooms in a hotel, lodging house or rooming house, or for the collection of the rent of any such premises, or for the recovery of possession of any such premises for neglect or refusal to pay the rent due or for

creating any nuisance, if such proceedings are in conformity with the laws of the commonwealth, shall be fully effective notwithstanding any failure to comply with regulations of any officer or agency of any other body politic and corporate, and such proceedings shall in no respect be subject to any such regulations.

Its purpose is to free the Massachusetts Courts from the restrictions imposed by the federal OPA regulations in protecting the rights of landowners provided by the laws of Massachusetts against tenants who do not pay rent, will not move out, and who may be damaging the property or creating a nuisance, etc.

We sympathize with the purpose of the bill but we do not see how anything can be done about it in view of the decisions of the court sustaining the federal war emergency statute and the OPA regulations thereunder.

The Massachusetts court in June of this year in *Schaffer* v. *Leimberg*, 1945 Adv. Sheets 811, reversed the municipal court of the City of Boston which had declined to take jurisdiction of a suit for the federal punitive damages against a landlord and, in spite of caustic language about the federal act, held that it was, nevertheless, part of the supreme law of the land under article 6 of the Constitution of the United States which provides that "the judges in every state shall be bound thereby anything in the Constitution or laws of any statute to the contrary notwithstanding"; that treble damages for a violation of such statutes were remedial and not penal and that the claim was within the jurisdiction of Massachusetts courts of actions of contract or tort, and therefore it was the duty of the Massachusetts courts to entertain the action.

On the other hand, in July of this year in the case of *Robinson* v. *Norato*, 43 Atlantic Rep. pp. 467–475, the Supreme court of Rhode Island, while agreeing that the courts of that state had jurisdiction if the penalty provided by the federal act was one which their courts should enforce, held, nevertheless, that under the law of Rhode Island as established in an earlier case the Rhode Island courts did not take jurisdiction of actions to enforce the penal law of some other jurisdiction, and the court saw no occasion for departing from that rule of Rhode Island. After an extended opinion the court said:

> "To summarize our position, we hold that, in the consideration of a statute like the one before us, this court has the right and authority to determine its character before allowing it to be enforced in the courts of this state; that if we find it to be penal we may refuse to enforce it regardless of its federal origin; and that the federal Constitution does not require us to treat the United States in a matter of this nature more favorably than we do a sister state of the Union. The contrary view would make the state courts, nolens, volens, in effect, inferior federal courts to enforce *all* federal statutes, whenever Congress so declares."

It is noticeable that the Rhode Island differed from the Massachusetts Court on the question whether the federal law was penal in

providing punitive damages and held that it was. It is also noticeable that the Massachusetts court says "we assume that a state is not required to give jurisdiction to any of its courts to enforce a federal statute."

Under this sentence it may, perhaps, be possible, as a matter of strict law, for the legislature to withdraw the jurisdiction of state Courts of claims, for federal treble damages for violation of the OPA regulations under the act of Congress so that such actions could be brought only in the federal courts. H. 1128, however, does not deal with damages; it is, specifically, a proposal to withdraw the jurisdiction of a Massachusetts court to consider federal defenses based on the dilatory restrictions and requirements of the federal regulations on termination of tenancies, evictions, etc., in an action of summary process brought to get rid of a tenant. However, unreasonable some of these regulations and requirements may seem their purpose is protective against "economic distress during a war" emergency (to use a phrase from the opinion cited) and their application may, therefore, be legally inevitable by a court having jurisdiction to order eviction under state law for the duration of the war emergency rules of the federal government. It seems probable, therefore, that House 1128 would be unconstitutional. Whether conditions are such that the legislature considers such action ad isable if it is constitutional we do not know, but we believe no legislation on the "subject matter" referred to us should be enacted without first obtaining an advisory opinion from the justices of the Supreme Judicial Court.

The emergency regulations seem likely to end in the *relatively* near future now that the fighting has stopped, when the war emergency is formally declared at an end by the federal authority.

For these reasons we are not prepared to recommend the passage of House 1128.

Rules of Evidence

We again call attention to two recommendations in the 20th. Report of the Judicial Council as to rules of evidence. The reasons for these recommendations were stated in the 18th. Report of the Council pp. 22 and 23, and the recommendations were renewed in the 20th. Report on p. 40 as follows:

EVIDENCE OF REPUTATION AS TO CHARACTER — DRAFT ACT

"Whenever reputation is material, evidence of the reputation of a person at a relevant time in the community in which he then resided, or in a group with whom he then habitually associated in his work or business, is admissible."

As pointed out in the reports referred to we think this "would be

an improvement over the existing law" as now restricted. (See *Stock* v. *Delapenna*, 217 Mass. 503.)

Commercial Lists and the Like

The draft on this subject submitted in the 18th. Report (p. 23) has been restudied, slightly revised, and is now recommended in the following form:

DRAFT ACT

"Statements of facts of general interest to persons engaged in an occupation contained in a list, register, periodical, book, or other compilation, issued to the public, shall be admissible in civil cases as evidence of the truth of any fact so stated in the discretion of the court, if the court finds that the compilation is published for the use of persons engaged in that occupation and commonly is used and relied upon by them."

As stated in the reports referred to, while this would apparently change the law in Massachusetts (see *National Bank of Commerce* v. *City of New Bedford*, 175 Mass. 257) we see no reason why the court should not use information and reports which people engaged in a business rely on customarily outside of a courtroom. (See *Virginia* v. *West Virginia*, 238 U. S. 202, 212.)

Hospital Records of Other States as Evidence

We believe that records of hospitals in other states should be made admissible in Massachusetts *if properly kept* as records of Massachusetts hospitals are admissible and we, therefore, recommend the following

DRAFT ACT

Section seventy-nine of chapter two hundred thirty-three of General Laws, as most recently amended by chapter two hundred thirty-three of the acts of nineteen hundred and forty-three, is hereby further amended by inserting after the word "admissible" in the first sentence thereof the following: — and records which the court finds are required to be kept by the laws of any other state or territory, or the District of Columbia by hospitals similarly conducted or operated or which, being incorporated, offer treatment free of charge, may be admitted by the court, in its discretion, — so as to read as follows:

Sec. 79. Records of Hospitals. — Records kept by hospitals under section seventy of chapter one hundred and eleven shall be admissible, and records which the court finds are required to be kept by the laws of any other state or territory, or the District of Columbia by hospitals similarly conducted or operated or which, being incorporated, offer treatment free of charge, may be admitted by the court, in its discretion, as evidence in the courts of the commonwealth so far as such records relate to the treatment and medical history of such cases and the court

may, in its discretion, admit copies of such records, if certified by the persons in custody thereof to be true and complete; but nothing therein contained shall be admissible as evidence upon the issue of liability. Copies of photographic or micro-photographic records so kept by hospitals, when duly certified by the person in charge of the hospital, shall be admitted in evidence equally with the original photographs or micro-photographs.

Notice to Admit Facts

Section 69 of chapter 231 of the General Laws provides that in an action at law or equity a party may file a written demand and notice to the other party calling upon the other party to admit, for the purposes of the case only, any material fact or facts or the execution of any material paper or document which the party filing the demand intends to use at the trial, and further provides:

"Such demand insofar as it relates to a material fact or document, and any answer filed in response thereto shall, if offered by the parties who filed such demand, be admitted in evidence." This statute was briefly discussed by the Judicial Council in its first report on p. 43 where the Council described the statute as one "enabling parties to reduce the case before trial to the matters really in controversy between them." This purpose of the statute was confirmed in the opinion of Chief Justice Rugg in *Gordon* v. *American Tankers Corp.*, 286 Mass. at p. 354 with a reference to the report of the Judicial Council above mentioned, as follows:

> "The statute was designed to reduce the case before trial to the matters really in controversy between them and thus to save expense to themselves and to the public by shortening the time required for hearing and to avoid confusion arising from the multiplicity of issues."

He points out, however, that:

> "There is no mandate that the demand and answers shall be taken as facts for the purpose of the trial. When the demand and answers are offered by the party who filed the demand they are simply to be 'admitted in evidence.' The statute makes no declaration as to their quality as evidence. It does not provide that they shall become binding."

The words "shall be admitted in evidence" were not in the proposed draft of the statute submitted by the Judicial Council on p. 144 of its 1st. Report (see p. 105 of this Report).

The provision that the demand and answers may merely "be admitted in evidence" tends to defeat the purpose of the statute which is to enable a party to rely on the facts admitted as undisputed in preparation for trial. He cannot do this if the facts thus admitted may be controverted by other evidence at the trial. As pointed out in an article in the "Bar Bulletin" for April, 1945, a party may have

to take the deposition of some witness, and if he takes it relying on the admissions made in answer to a notice and does not cover the facts admitted in the deposition, he might lose his case because the facts admitted might later be disputed at the trial. Obviously the statute failed in this respect in its purpose to enable parties to prepare for trials. We think the purpose of the statute should be carried out by amendment so that parties may rely on admissions in preparing for trial. We recommend the following

DRAFT ACT

Section 69 of chapter 231 of the General Laws is hereby amended by striking out the sentence "such demand insofar as it relates to a material fact or document and any answer filed in response thereto shall, if offered by the party who filed such demand, be admitted in evidence" and substituting the following:

"Such demand and any admission filed in answer thereto, insofar as they relate to a material fact or document unless amended by leave of court before trial, shall if offered by the party who filed the demand be binding upon the party making the admission, for the purposes of the case only."

Entry Fees for Plaintiffs not Claiming Jointly who Have Joined in One Action Under Chapter 350 of the Acts of 1943

Chapter 350 of the acts of 1943 provided that different plaintiffs having separate causes of action might be joined in one action for damages against one or more defendants instead of bringing separate actions with the incidental expense of separate service of process and other duplicated or multiplied proceedings. While this was a business-like step in procedure in the public interest, yet in view of the expense to the public of maintaining the courts, discussed in the report of the joint committee on ways and means in 1943 and referred to on pages 61–62 of our 20th Report, we see no reason why each separate plaintiff thus allowed to join with others in an action arising out of the same facts should not be expected to pay the same entry fee that he would pay if he brought a separate action. We therefore recommend the following

DRAFT ACT

Section 4A of chapter 231 of the General Laws inserted by chapter 350 of the acts of 1943 is hereby amended by adding at the end thereof the following sentence:

Persons not claiming jointly who join in one action as plaintiffs under this section shall pay the same entry fee as would be required in separate actions.

In connection with various bills about sentences discussed in this Report we reprint in appendix F for convenient reference, a careful statement of the statutory history of the reformatories and of the indeterminate sentence in Massachusetts from a brief of former

Attorney General Benton and Assistant Attorney General Yorke in 1926, in the case of *Platt* v. *Commonwealth*, 256 Mass. 539. We believe it advisable that this helpful story should be readily accessible to the bench and bar instead of being buried in the old files in the library.

The usual summary of the work accomplished by the various courts with statistical tables of details and noticeable facts indicated by the tables will be found in Appendix E.

Respectfully submitted,

FRANK J. DONAHUE, *Chairman*,
NATHAN P. AVERY, *Vice-Chairman*,
LOUIS S. COX,
JOHN E. FENTON,
JOHN C. LEGGAT,
WILFRED BOLSTER,
FRANK L. RILEY,
FREDERIC J. MULDOON,
SAMUEL P. SEARS,
WILFRED J. PAQUET.

SUPERIOR COURT

APPELLATE DIVISION FOR REVIEW OF SENTENCES TO STATE PRISON PROVIDED FOR BY ST. 1943 CH. 558

November 1, 1944 to October 31, 1945

Defendants filing appeals	38		Defendants filing Requests to Appellate Division for leave to appeal	3	
Sentences Modified		4	Granted		2
Sentences Increased		2	Denied		1
Appeals Dismissed		24			
Appeals Withdrawn		3			
Pending October 31, 1945		6			
		39*			3

* 1 sentence modified and
1 appeal dismissed in same case

The Division consisting of 3 Justices sat 9 days.

St. 1945 Ch. 255 amended St. 1943 Ch. 558 to provide for reviews by the Appellate Division of certain sentences to the Reformatory for women.

St. 1945 Ch. 437 provided for appeals to the Appellate Division from certain sentences to the state prison imposed prior to November 1, 1943. Such appeals must be filed within two years after the effective date of the Act. The Act was approved June 20, 1945. 116 appeals were filed to and including October 31, 1945.

APPENDIX A

CIRCULAR LETTER OF ADMINISTRATIVE COMMITTEE OF THE PROBATE COURTS

March 12, 1945.

To the Judges of Probate:

The Massachusetts Bar Association has called to the attention of the Administrative Committee of the Probate Courts a lack of uniformity of practice among the Probate Judges in the handling of libels brought by men and women in the Service. The Bar Association has urgently requested action by this Committee to the end that the practice be uniform.

The Administrative Committee, using the advisory powers conferred upon it by statute, advise the Judges of Probate as follows:

That in the case of a libel brought by a man or woman in the Service, it is not necessary that he or she be present at the hearing of said libel or submit a deposition, if the case can be proved by other evidence

In this connection, the Committee calls attention to a case recently decided in Illinois, — *Kinsley* v. *Kinsley*, 57 N. E. (2nd) 449.

FREDERICK J. DILLON,
Secretary to the Administrative
Committee of the Probate Courts.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

Administrative Committee of the District Courts

JANUARY 2, 1945.

TO THE JUSTICES, CLERKS AND PROBATION OFFICERS OF THE DISTRICT COURTS:

We are sending herewith on separate sheet the statistical compilation of the work of the District Courts for the year ending September 30, 1944. A five-year comcomparison is as follows: [*These figures will be found in the 20th. Judicial Council Report p. 28.*]

A study of the statistics shows a continued lessening in the volume of all the important types of business of the District Courts. [*Following a summary based on the figures the Committee continued.*]

The compilation of statistical returns confirms the information we have received during the year of the declining business in practically all the courts. The repeal of the so-called Fielding Act requiring the entry of all motor tort cases in the District Courts was a large factor in reducing the number of tort actions entered.

The year established one record of which we can all be proud. As of September 30th, 1944 there were no decisions in civil actions which had been delayed beyond the period of sixty days after the close of the hearings. . . .

DETERMINATION OF NUMBER OF SIMULTANEOUS SESSIONS

AMENDMENT TO REQUIREMENT NO. III

(Effective January 1st, 1945)

The number of simultaneous sessions which may be held in each of the District Courts below named during the calendar year 1945 has been determined as follows:

Simultaneous sessions may be held not to exceed ten in number in the following named courts: (*List of courts omitted.*)

The number of simultaneous sessions which may be held is determined not to exceed twenty (20) in the following courts: (*List of courts omitted.*)

The number of simultaneous sessions which may be held is determined as not to exceed the number following the names of the remaining District Courts: (*List of courts omitted.*)

Extraordinary situations may be submitted to this Committee for appropriate action.

THE LATEST REPORT OF THE JUDICIAL COUNCIL

(*After calling attention to parts of the 20th. Report of the Council the Committee continued.*)

TWO INTERESTING CASES

(1) *Barclay* vs. *Phillips*, 1944 A. S. 1311

This was a motor tort action. The Trial Judge in the District Court found for the

plaintiff and assessed damages in the sum of $21,000. The Appellate Division dismissed a report and the defendant appealed. The opinion of the Supreme Judicial Court discusses at length the denial of the motion for a new trial because of alleged excessive damages awarded. This Court affirmed the order of the Appellate Division dismissing the report.

(2) *Quincy Trust Company* vs *Taylor Executrix*, 1944 A. S. 1477

The opinion discusses at length and with clarity allowable action by a court of its own motion.

A Suggestion as to Requirement No. 1

Under date of January 28, 1942, we promulgated Requirement No. I which reads as follows:

"Each judge of a District Court coming within the terms of Chapter 682 of the Acts of 1941 shall keep a daily record of the Court's sittings and of all sittings by special justices, whether simultaneous or not, upon printed or typed cards or slips which may be in bound form to be filed in chronological order, to be open to the inspection of the legislature and this committee and to be of the tenor following:

Form No. 1

Commonwealth of Massachusetts

.....

Name of Court

DAILY RECORD.

Date.....

I hereby certify that on this date I was present at the Court House from.....

.....A.M. until.....M.

.....

Justice."

So far as we are aware, the records kept under the terms of this Requirement have been used but once. The volume of business at the present time is so abnormal that the information furnished by the cards is not of as much value as heretofore. We are fully aware that the necessity for keeping the records called for in this Requirement has been an irritating and vexatious matter. Under all the circumstances, it seems to the Committee that Chapter 682 of the Acts of 1941 might well be amended so as to relieve us of the obligation set forth in the Requirement.

Entries in Criminal Cases

We are advised by the auditors that since the publication of our recommendations in the circular letter of January 21st, 1943, there has been a distinct improvement in the records of the District Courts. In almost all, cases are now closed properly.

However they state there are still a few of the courts which stick to the old entries and do not properly close the cases. Occasionally we find the entry "Continued generally" or "Continued from day to day." We have never had any authority or support for such an entry.

A Report of the Committee's Activities

Our Committee had during 1944 a fairly busy year. The remainder of the courts have been visited. In some cases where there has been a change in the judgeship, we have paid a second visit. We have also been to the training schools and all the penal institutions to which we commit. Officials having mutual interests have met with us from time to time. We have had regular sessions on the second Thursday of each month. There have been a substantial number of complaints which have been investigated. Some of these have been due to ignorance and some were fancied grievances. Every court has experience with unreasonable people. On the other hand, there have been instances of improper conduct, of dictatorial and offensive treatment of members of the bar and persons before the court. Some of such has been inexcusable, whatever may have been the aggravation. In one case the Committee felt obliged and with great regret but for good cause to revoke the assignment of a Special Justice for service in his own and another court. His conduct was such we could not excuse it. At the end of two months, it was represented to us that further discipline was not necessary as it was believed there would be no further complaint. Consequently an order of reassignment was issued.

The epidemic of contempt proceedings has we hope subsided. One of the necessary qualities in a judge is patience, another is silence. Scolding and vituperation serve no good purpose. They only lower the judge to the state of the party of which he is complaining and should always be avoided.

Charles L. Hibbard, Chairman
Elbridge G. Davis
Frank L. Riley
Richard M. Walsh
Kenneth L. Nash

COMMONWEALTH OF MASSACHUSETTS

Administrative Committee of the District Courts

July 30, 1945.

To the Justices, Clerks and Probation Officers
of the District Courts:

In conformity with long established custom, this circular letter is being sent to all the District Courts and to the Trial Justices.

Important Acts Enacted in the Current Session of the Legislature

[*After calling attention to 34 acts the circular continues.*]

AN INDEX OF MATTERS DISCUSSED IN CIRCULAR LETTERS ISSUED BY THIS COMMITTEE:

Through the courtesy of Hon. Lyman K. Clark of Ayer, we have had made available to us for printing an index of the subjects discussed in the letters of the Committee which we believe will be found useful. The references are of course to the letters bearing the dates indicated by the numerals.

[*A complete set of these letters may be found in the headquarters of the Massachusetts Bar Association, Room 622, 53 State St., Boston, and presumably also in the County Law libraries.*]

INDEX

TO

LETTERS OF ADMINISTRATIVE COMMITTEE

1929–1944

(Statutes Not Included)

SUPREME COURT DECISIONS

Wind Innersole & Counter Co. Inc.
v.
Simon Geilich et als

The above entitled case is found in the 1944 Adv. Sheets at page 1651. The Supreme Judicial Court was called upon to interpret the provisions of Rule 28 of the District Courts (1940) and particularly the section which reads as follows:

"A copy of such report shall be delivered or mailed postpaid by the party requesting the report to the Trial Justice before the close of the next business day after such filing."

The Court held that this provision was mandatory.

Commonwealth
v.
Truzcinakas 1945 Adv. Sheets 693

This case was a complaint for non-support and deals with presumptions and burden of proof.

Commonwealth
v.
Jensky 1945 Adv. Shs. 727.

The decision in this case which involved "registering of bets" is of value.

Schaffer
v.
Leimberg 1945 Adv. Shs. 811

In this case the Supreme Court rules that the Boston Municipal Court was in error in declining jurisdiction in an OPA case. The constitutionality of the statute apparently was not involved in this decision.

Bartlett
v.
Cambridge 1945 Adv. Shs. 835.

The decision in this case is quite important in connection with Appellate Division procedure.

A PERSONAL WORD

The Committee has made extensive visits during the past six months to the District Courts, particularly for the purpose of becoming acquainted with new personnel. The courtesy and consideration extended to the Committee has been greatly appreciated.

We deem it proper and appropriate to suggest to the various court officials that they take particular pains in the investigation and disposition of cases of returning service men. There will doubtless be a substantial number of individual cases where the experience of the parties involved should be taken into consideration in determining their responsibility. On the other hand, the fact of service should not in and of itself permit defendants to escape responsibility for criminal acts.

As of July 2nd, Judge Hibbard retired as Chairman of the Committee and Judge Frank L. Riley of Worcester succeeded him.

Charles L. Hibbard
Elbridge G. Davis
Frank L. Riley
Richard M. Walsh
Kenneth L. Nash

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TABLE OF COMMITMENTS FOR ADULTERY

(Submitted by the Board of Parole)

Years	1943	1942	1941	1940	1939	1938	1937	1936	1935	1934
State Prison	–	–	–	1–2½–3 yrs.	–	–	–	–	–	–
Massachusetts Reformatory	1	1	–	1	–	–	–	–	–	–
Reformatory for Women	18	15	11	16	16	17	8	6	6	12

Houses of Correction

Males	56	*Females*	35
Sentences		Sentences	
Fines	15	Fines	7
1 yr.	8	1 yr.	1
2 yrs.	3	1 mo.	5
1 mo.	6	2 mo.	1
2 mo.	5	3 mo.	13
3 mo.	7	4 mo.	1
4 mo.	2	6 mo.	1
6 mo.	9	9 mo.	6
8 dys.	1		

APPENDIX C

EXTRACT FROM VERNIER "AMERICAN FAMILY LAWS" VOL. II (Pp. 172–174)

"After an absolute divorce either party is free to marry again in the absence of statutory prohibition. A court may not, without statutory authority, prohibit the remarriage even of the guilty party. The effect of a divorce, unless otherwise limited, is to dissolve the marriage and restore both innocent and guilty parties to the status of single persons (see general effect of divorce, *Sec. 91*).

"However, thirty-six American jurisdictions have, by express statute, limited the right of divorced persons to marry again. There is considerable variation in both the method of imposing the limitation and the type of limitation.

The statutes disclose the following methods of limiting a second marriage by divorced parties. (1) One state, *South Carolina*, grants no divorces. (2) Other states (see *Secs. 114–20*) have a double system of absolute and limited divorces. If this system was adopted in the hope that the majority of discontented married people would be satisfied with a form of relief which would make another marriage impossible, it has substantially failed. Married persons having the option prefer the absolute divorce in the vast majority of cases. (3) Still other states (see *Sec. 88*) limit the right to marry again by postponing the decree which dissolves the marriage bond. This limitation operates in two ways: first, a legal marriage to a third person is impossible until the decree is made final; second, during the interval between the judgment declaring the right to a divorce and the final judgment, the parties may become reconciled. (4) A fourth method of limiting remarriage is to declare that a remarriage within a certain period after the divorce shall be "null and void." Such statutes expressly or by implication make an exception of remarriage of the divorced parties to each other. (5) Some states limit or prohibit the remarriage of one or both parties by imposition of penalties. The usual penalty is the same as for bigamy. This method is unsatisfactory because of the possibility of evasion by marrying again in another state or country. (6) Finally, in many states, a combination of two or more of the foregoing methods is found. Thus, the second marriage may be prohibited by penalty and also declared null and void. Or a state may prohibit it by penalty and have a marriage evasion statute. Even the states having the most satisfactory method, viz., the delayed divorce decree, often supplement it by additional prohibitions, especially those imposed upon the guilty party.

Limitation upon the right of remarriage after divorce may be briefly classified by type as follows: (1) limitations applying equally to both innocent and guilty parties; (2) limitations applying to the guilty party only; (3) limitations applying to both, but more drastic for the guilty party.

In most states where the limitation is discretionary in any degree, the court fixes the limits of the prohibition. *Georgia* seems to be the state where such disability is fixed by jury. The main features of the statutes for each jurisdiction are found in the table following. It will be noted that the limitation, whether imposed upon both parties or only upon the guilty one, varies greatly in time, being six months in twelve states, one year in eight, two years in four, etc. The total spread is from one month to life.

"No statutes relating to remarriage were found in *Florida*, *Maine*, *Maryland*, *Missouri*, *New Hampshire*, or *New Mexico*. The jurisdictions having statutes expressly permitting remarriage are included in the table." (*Table omitted*)

APPENDIX D

PENALTIES FOR ADULTERY IN VARIOUS STATES

(Compiled by the Board of Parole)

State	*Edition*		
Alabama	1940	Misdemeanor	Not more than 6 months, or $500 fine
Arizona	1939		Not more than 3 years
Arkansas	1937	Misdemeanor	First offense, fine of $20 to $100 Second offense, fine of $500 or 12 months; $500 and 12 months
California	1942	Misdemeanor	1 yr. maximum, or $1,000 fine
Colorado	1936	Misdemeanor	6 mos. maximum or $200 fine (Penalty doubled for each secondary offense)
Connecticut			5 yrs. maximum
Delaware	1936	Misdemeanor	1 yr. maximum, or $500 fine
District of Columbia	1940		1 yr. maximum, or $500 or both
Florida	1941		2 yrs. maximum, or $500 fine
Georgia	1933	Misdemeanor	Maximum 6 mos. prison or fine not exceeding $1,000 or chain gang 12 mos. or female to State Farm 12 mos.
Idaho	1932		Fine, not less than $100 or State Prison not exceeding 3 yrs. or county jail not exceeding 1 yr. or fine not exceeding $100
Illinois	1943		County jail not exceeding 1 yr. or fine not exceeding $500. Penalty doubles and trebles on 2nd and 3rd offense
Indiana	1934		6 mos. maximum, or $500 max. fine
Iowa	1939		1 yr. maximum plus $300 fine or 3 yrs.
Kansas	1935	Misdemeanor	6 mos. maximum or $500 maximum fine or both
Kentucky	1944		Fine, minimum $20, maximum $50
Louisiana			Not mentioned in statutes.
Maine			5 yrs. maximum, or $1,000 max. fine
Maryland			$10 fine
Michigan			Imprisonment not exceeding 3 yrs. or fine not exceeding $500
Minnesota			Not more than 2 yrs. or not more than $300 fine, and only on complaint of husband or wife of offender
Mississippi			Not more than 6 mos. and $500 fine
Missouri	1929	Misdemeanor	
Montana	1925		County jail, not exceeding 6 mos. and (or) fine not exceeding $500

PENALTIES FOR ADULTERY IN VARIOUS STATES—*Cont.*

State	*Edition*		
Nebraska	1929		Imprisonment not exceeding 1 yr.
Nevada			Does not deal with adultery except as cause for divorce
New Hampshire	1942		1 yr. and $100 fine, or 3 yrs.
New Jersey		Misdemeanor	Not more than three years
New Mexico			Does not deal with adultery except as grounds for divorce
New York			Not more than 6 mos. or fine of not more than $250
No. Carolina		Misdemeanor	Discretion of the Court
No. Dakota	1913		Does not deal with aduitery except as cause for divorce
Ohio			Not more than 2 mos., or not more than $200 fine
Oregon			6 mos. to 2 yrs. penitentiary, or 6 mos. to 1 yr. county jail, or by fine of minimum, $200 max. $1,000
Oklahoma	1941		Imprisonment not exceeding 5 yrs. and (or) fine not exceeding $500
Pennsylvania			Imprisonment not exceeding 1 yr. or fine not exceeding $500
Rhode Island			1 yr. imprisonment or $500 fine
So. Carolina	1942		Not less than 6 mos., nor more than 1 yr., and (or) fine from $100 to $500
So. Dakota			Not mentioned
Tennessee	1932		Not mentioned
Texas	1936		Fine of $100 to $1,000
Utah	1943		Imprisonment not exceeding 3 yrs.
Vermont	1933		Not more than 5 yrs., not more than $1,000 fine or both
Virginia	1942	Misdemeanor	Not less than a fine of $20
W. Virginia	1943	Misdemeanor	Not less than a fine of $20
Washington			Not more than 2 yrs. or fine of not more than $1,000
Wisconsin	1943		1 to 3 yrs. or $200 to $1,000 fine
Wyoming	1931		Not more than 3 mos. and not more than $100 fine

APPENDIX E

Summary of the Work Accomplished by the Various Courts

The act creating the Judicial Council (reprinted at the beginning of this report) provides that the Council shall study "the work accomplished and the results produced by the judicial system and its various parts" and "shall report annually upon the work of the various branches."

The annual periods reported by the different courts are not the same, some reporting for the last calendar year while others report from June 30 to June 30, or from September 1 to September 1, etc. The details as to counties appear below.

Supreme Judicial Court (*Full Bench Cases*)

During the court year fromSeptember 1, 1944, to August 31, 1945, the Supreme Judicial Court handed down 248 opinions, 29 rescripts which were not accompanied by opinions, and 1 advisory opinion at the request of the Senate. These opinions are reported beginning in 316 Mass. at page 659 and ending in 318 Mass. at page 496 and Supplement.

As stated in last year's report, the court has now practically caught up with its docket.

The table of full-bench cases since 1875 appears on p. 71 of the 15th. Report. The usual table of Supreme Court business, other than full-bench cases, with more detailed statements from Suffolk county appears on the following page.

SUPREME JUDICIAL COURT ENTRIES FOR ALL COUNTIES

For the Year Beginning September 1, 1944, through August 31, 1945

(Not including full bench cases)

	Equity	Transferred to Superior Court	Referred to Masters or Auditors	Prerogative Writs	Petitions for Admission to Bar	Other Proceedings
Barnstable	—	—	—	—	—	—
Berkshire	—	—	—	—	—	1
Bristol	—	1	—	—	—	1
Dukes	—	—	—	—	—	—
Essex	2	—	—	1	—	3
Franklin	—	—	—	—	—	—
Hampden	—	—	—	2	—	1
Hampshire	—	—	—	—	—	—
Middlesex	1	—	—	1	—	—
Nantucket	—	—	—	—	—	—
Norfolk	3	—	—	—	—	—
Plymouth	4	1	—	—	—	—
Worcester	—	—	—	—	—	—
Totals	10	2	—	4	—	6

*In some instances a single opinion covered more than one case.

SUPREME JUDICIAL COURT FOR THE COUNTY OF SUFFOLK

REPORT FROM SEPTEMBER 1, 1944 TO SEPTEMBER 1, 1945

Transferred to Superior Court	Referred to Masters or Auditors	Prerogative Writs	Petitions for Admission to the Bar
4	0	19	274

Law Docket

Petitions for Admission to the Bar	274
Petitions for Writs of Error	7
Petitions for Writs of Certiorari	5
Petitions for Writs of Mandamus	4
Petitions for Writs of Habeas Corpus	2
Petition for Writ of Prohibition	1
Petition for Stay of Execution	1
Petition for Disbarment	1
Appeals from decision of Appellate Tax Board	17
Total Entries on Law Docket	312

Equity Docket

Information by Attorney General (for failure to file returns, etc.)	107
Petitions for Suspension of Decree of Superior Court	5
Petitions for Dissolution under G. L. c. 155, s. 50A (about 1680 corporations)	3
Petitions for Dissolution	1
Petitions in Equity	2
Petition for leave to convey property	1
Petition for Instructions	1
Petitions under G. L. c. 112, s. 64	8
Bills of Complaint	2
Bill of Complaint under G. L. (Ter. Ed.) c. 25, s. 5	1
Total Entries on Equity Docket	131
Total Entries on both Dockets	443

THE SUPERIOR COURT.

This court consists of a chief justice and thirty-one associate justices. It has unlimited civil and criminal jurisdiction and holds sessions in all of the fourteen counties. It is the only court sitting with juries. The tabulated returns of the clerks under St. 1936, Chap 31, § 3 for the year ending June 30, 1945, will be found on pp. 84–95.

To have a true picture of the work of the trial sessions one must take into consideration many cases settled during trials and others nonsuited or defaulted. An example is Suffolk County where a case is deemed tried only when a trial results in a verdict or disagreement. Over 66 per cent of all civil cases tried are tried in this county.

Motion sessions are held regularly in Suffolk, Middlesex, Worcester, Hampden and Essex and Norfolk Counties. In other counties motions are considered at jury-waived sessions. Many questions are considered by the court at these sessions.

The returns do not indicate how many cases were continued indefinitely because of absence of a party in the military or naval services. The effect of the war, however, is shown by the figures in this court as it is in the district courts.

Pre-trial Work of Superior Court in Suffolk County

July 1, 1944 to June 30, 1945

The Court sat 185 days for pre-trial in Suffolk County.

Number of Cases on Pre-trial List	7,194
" " " Pre-tried	3,360
" " " Settled by Agreement	1,330
" " " Nonsuited	112
" " " Defaulted	50
" " " Disposed of by nonsuit and default, or discontinued	7
" " " Referred to auditors	6
" " " Where Jury was waived	388
" " " Continued	1,595
" " " Cases to trial lists (short lists)	1,375
" " " Cases from pre-trial lists settled on trial lists (short lists)	1,070
Number of days Court sat for pre-trial	185

Pre-trial "Dispositions"

Cases on Pre-trial List			7,194
" Pre-tried	3,360		
" not Pre-tried	3,834		
		7,194	
Cases Pre-tried and Settled while awaiting Trial	1,070		
Referred to Auditors	6		
Sent to Trial Sessions	1,763		
Awaiting Trial	521		
		3,360	
Cases not Pre-tried			
Settled	1,330		
Nonsuits	112		
Defaults	50		
Nonsuits and Defaults	7		
Continuances	1,595		
Cases Continued and Ordered on Non-triable Docket	740		
		3,834	
Total Pre-trial "Dispositions"			7,194

REFERENCES TO AUDITORS AND MASTERS IN THE SUPERIOR COURT

Calendar Year 1941 and 1944

County	Auditors other than for Motor Vehicle Torts				Master				Auditors for Motor Vehicle Torts			
	1941	1942	1943	1944	1941	1942	1943	1944	1941	1942	1943	1944
Barnstable	11	7	4	–	5	3	2	–	–	–	–	–
Berkshire	5	11	4	7	4	10	7	5	1	4	–	–
Bristol	17	19	6	2	22	24	11	7	18	8	–	–
Essex	33	13	9	8	32	25	10	7	80	14	5	–
Franklin	2	4	2	–	5	2	1	–	–	–	–	–
Hampden	39	33	26	15	20	11	8	5	137	68	–	–
Hampshire	2	7	–	–	3	5	–	1	–	–	–	–
Middlesex	130	20	6	2	73	44	7	4	391	107	–	–
Norfolk	13	6	3	5	20	12	–	–	112	45	2	–
Plymouth	2	2	2	3	8	11	6	8	9	6	–	–
Suffolk	114	78	5	23	165	77	31	24	540	405	2	–
Worcester	73	91	35	18	41	23	23	11	56	201	2	2
	441	291	102	83	398	247	107	721	1,344	858	11	2

Two or more cases tried together are counted as one reference.

Appointment of Auditors in motor tort cases was practically discontinued on November 1, 1942.

EXPENDITURES AUDITORS AND MASTERS

CALENDAR YEARS 1940–1944

	1940	1941	1942	1943	1944
Barnstable	$1,349.00	$3,760.00	$2,954.80	$362.50	$387.50
Berkshire	1,407.52	872.41	1,656.25	2,185.25	1,566.91
Bristol	12,166.77	10,665.00	5,597.50	3,347.50	2,362.06
Dukes County	–	–	50.00	75.00	–
Essex	20,759.30	18,353.05	6,042.83	3,403.52	905.73
Franklin	1,015.00	775.00	372.50	280.00	–
Hampden	15,404.24	10,016.74	6,429.30	2,765.00	2,318.07
Hampshire	1,603.50	507.50	2,140.25	267.50	111.45
Middlesex	28,940.01	35,590.02	24,870.87	5,403.28	4,791.25
Nantucket	–	–	–	–	–
Norfolk	8,078.78	9,657.50	5,636.25	1,045.00	648.75
Plymouth	9,350.50	4,086.25	2,850.50	1,423.75	3,539.33
Suffolk	92,243.60	69,464.09	48,574.50	25,902.68	11,420.75
Worcester	13,463.25	13,102.25	15,415.35	10,386.20	3,786.25
	$205,790.47	$176,849.81	$122,590.90	$56,847.18	$31,838.05

Note. In Suffolk County these figures apply to the Superior Court (Civil) only. In other counties to all Courts.

SUPERIOR COURT LAW ENTRIES

(Prepared by the Executive Clerk of the Chief Justice)

January–December, 1944

	Law Entries				Motor Vehicle Tort Removed			
	Total	Original Entries	Orig. M.V.T. Entries	Removed from District Courts	Total	By Piff.	By Deft.	By Order
January	1,061	730	362	331	244	4	234	6
February	1,291	963	586	328	221	4	215	2
March	1,190	926	478	264	191	2	188	1
April	1,042	710	390	332	251	3	246	2
May	1,237	876	517	361	254	5	245	4
June	1,366	1,059	680	307	218	3	213	2
Total 6 Mos.	7,187	5,264	3,013	1,923	1,379	21	1,341	17
July	1,113	816	471	297	204	–	199	5
August	1,198	982	603	216	141	–	139	2
September	1,073	818	488	255	165	–	161	4
October	1,110	813	471	297	211	–	198	13
November	1,274	939	530	335	241	–	232	9
December	1,236	939	527	297	218	–	210	8
Total 6 Mos.	7,004	5,307	3,090	1,697	1,180	–	1,139	41
Total Year	14,191	10,571	6,103	3,620	2,559	21	2,480	58

SUPERIOR COURT LAW ENTRIES — STATE

From October 1, 1934 to December 31, 1944

	Law Entries			Motor Vehicle Tort Removed			Orig. M.V.T. Ent. Superior Court
	Total	Orig.	Removed from District Courts	Total	By Piff.	By Deft.	
3 Mos., Oct., Nov., Dec. 1934	6,115	3,121	2,994	2,462	1,145	1,334	–
Cal. Year							
1935	20,321	7,395	12,926	10,781	6,164	4,643	–
1936	22,534	7,098	15,436	13,369	8,430	4,959	–
1937	26,022	7,226	18,794	16,766	10,673	6,093	–
1938	26,732	6,787	19,945	17,879	10,809	7,070	–
1939	26,607	7,691	18,916	17,391	10,275	7,116	–
1940	25,313	7,032	18,281	16,313	9,309	7,004	–
1941	24,796	6,287	18,509	16,658	8,308	8,350	–
1942	20,618	5,505	15,113	13,485	5,359	8,133	–
1943	13,819	5,805	8,014	6,832	2,441	4,392	1,054*
1944	14,191	10,571	3,620	2,559	21	2,480	6,103

*4 months.

By St. 1934 ch. 387 (Fielding Act) District Courts given exclusive original jurisdiction of Motor Vehicle Tort Actions, Effective October 1, 1934.

St. 1943 ch. 296 original jurisdiction of Superior Court, concurrent with District Courts, restored. Effective September 1, 1943.

JURY CASES ADVANCED FOR TRIAL AND TRIED DURING YEAR ENDING JUNE 30, 1945

	Original Entries	Removed Cases	Total Advanced Cases Tried
Barnstable	–	–	–
Berkshire	–	–	–
Bristol			
Taunton	–	1	1
New Bedford	–	2	2
Fall River	–	2	2
Essex			
Salem	–	1	–
Lawrence	–	–	2
Newburyport	–	–	–
Franklin	–	–	–
Hampden	18	4	22
Hampshire	–	–	–
Middlesex			
Cambridge	26	4	30
Lowell	–	2	2
Norfolk	–	1	1
Plymouth			
Plymouth	–	–	–
Brockton	–	1	1
Suffolk	85	70	155
Worcester			
Worcester	6	2	8
Fitchburg	–	–	–
Total	155	90	225
Totals 1943–44	100	180	280
Totals 1942–43	145	610	755

LAND COURT

This is a court of three judges created in 1898 for the registration of title to land and since then developed by additional extensions of jurisdiction both at law and in equity into the court in which almost all litigation regarding title to land takes place in addition to its original function of a court for the registration of title.

LAND COURT FIGURES FROM JULY 1, 1944 to JUNE 30, 1945

Registration Cases	353
Confirmation Cases	6
Post Registration Cases	689
Tax Lien Cases	1,376
Miscellaneous Cases	142
Equity Cases	733
Total cases entered	3,299
Decree plans made	307
Subdivision plans made	325
Total plans made	632
Total appropriation	$124,524.00
Fees sent State Treasurer	44,122.30
Income from Assurance Fund applicable to expenses	10,711.28
Unexpended balance	10,502.42
Net cost to Commonwealth	59,188.00
Assurance Fund Nov. 30, 1940	295,202.45
Assessed value of land on petitions for registration, confirmation	3,260,722.54

CASES DISPOSED OF BY FINAL ORDER DECREE OR JUDGMENT BEFORE HEARING

Land Registration	263
Land Registration—Supplementary	689
Tax Foreclosure	1,440
Equity, Real Actions & Miscellaneous	757
Total cases disposed of	3,149

When the state changed its fiscal year the Land Court changed its statistical year to coincide with it. Therefore, the figures are not on a calendar year basis as in previous reports.

PROBATE COURTS

There is a probate court in each county with jurisdiction of wills, trusts, settlement of estates, guardianship, adoption, change of name, divorce and separate maintenance and a variety of other matters. There are three judges in Suffolk, two in Middlesex, two in Essex, two in Worcester and one in each of the other counties.

The report prepared by the Administrative Committee of the Probate Courts for the year 1944 appears on page 98.

THE MUNICIPAL COURT OF THE CITY OF BOSTON

This court consists of a chief justice and eight associate justices, all full time judges. There are also six special justices. The tables showing the *details* of the civil business for the year 1943 will be found on pp. 96–97. The comparative table of civil business from 1913 to 1939 will be found in the 15th. Report, p. 65. The condensed civil and criminal business and other information for the year 1944 and the first 9 months of 1945 is as follows:

MUNICIPAL COURT OF THE CITY OF BOSTON
CIVIL ACTIONS (OTHER THAN SMALL CLAIMS CASES)

YEAR	Entered	Removed	Per Cent	All Defaults	Per Cent of Entries	Tried	Per Cent of Entries	Total Plaintiff's Judgments	Average Plaintiff's Judgments Contract only	Heard, Appellate Division	Per Cent of Entries	To Supreme Judicial Court
1944 .	12,021	478	3.9	5,752	44.5	1,253	10.4	$1,293,729.22	$160.76	24	1.9	6
1945 9 Mos.	8,274	344	4.1	3,873	46.8	828	10.0	839,086.00	152.36	20	2.4	2

The jurisdictional limits in civil cases from 1866 to 1877 were $300; from 1877 to 1894, $1,000; from 1894 to 1922, $2,000; from 1922 to September 1, 1929, $5,000; since 1929, the jurisdiction has been unlimited in amount.

SUBDIVISION—CONTRACT AND TORT—1944-1945

YEAR	ENTERED		REMOVED				TRIED	
	Contract	Tort	Contract	Per Cent of Entries	Tort	Per Cent of Entries	Contract	Tort
1944 .	8,122	3,204	167	2.0	301	9.3	544	548
1945 9 Mos.	5,489	2,243	121	2.2	215	9.5	358	318

TORT ENTRIES, REMOVALS AND TRIALS

1944

TORTS ENTERED		TORT REMOVALS		TORTS TRIED	
Motor Vehicle	2,318	Motor Vehicle, Piff.	10	Motor Vehicle	336
Other Torts	886	Motor Vehicle, Deft.	242	Other Torts	212
		Other Torts	49		
Total	3,204	Total	301	Total	548

1945 (9 Months January 1 to October 1)

TORTS ENTERED		TORT REMOVALS		TORTS TRIED	
Motor Vehicle	1,563	Motor Vehicle, Piff.	1	Motor Vehicle	194
Other Torts	680	Motor Vehicle, Deft.	197	Other Torts	124
		Other Torts	17		
Total	2,243	Total	215	Total	318

SUMMARY PROCESS (EJECTMENT) ENTRIES

1944	318
1945 (January through September, inc.)	303

SUPPLEMENTARY PROCESS ENTRIES

1944	1,716
1945 (January through September, inc.)	1,310

SMALL CLAIM DIVISION

	1944			1945 JANUARY - SEPT. 30		
	Contract	Tort	Total	Contract	Tort	Total
Actions Entered	1,020	73	1,093	744	91	835
Actions Settled	81	24	105	74	23	97
Counter-Claims or Set-offs	6	3	9	2	1	3
Trials	186	125	311	152	91	243
Reserved	76	60	136	74	38	112
Finding for Plaintiff	132	88	220	121	63	184
Finding for Defendant	54	37	91	31	28	59
Judgments by Default	438	42	480	270	36	306
Judgments by Non-Suit	7	4	11	3	5	8
Amount of Plaintiff's Judgments	$13,719.56	$1,682.15	$15,401.71	$11,211.78	$1,863.54	$13,075.32
Transferred to Regular Civil Docket	1	–	1	1	4	5
Removed to Superior Court	4	2	6	1	1	2
Executions	334	87	421	243	57	300
Amount of Plaintiff's Claims	$24,666.97	$2,419.32	$27,086.29	$17,542.41	$3,073.08	$20,615.49
Notices Returned Unclaimed	261	2	263	146	1	147

Criminal Business

October 1, 1944 to September 30, 1945

Cases begun	28,136	Traffic cases (including auto violations)	11,230
Discharged, nol prs., filed	8,873	Domestic Relations	291
Pleas guilty	23,380	Not arrested, default, pending	1,028
Pleas not guilty	2,982	Automobile violations	1,008
Findings not guilty	744	Automobile appeals	16
Held for Grand Jury	563	Traffic violations	10,222
Appeals	996	Traffic appeals	13
Court drunkenness	6,053	Cases reported for inquests	37
Drunks released by Probation Officer	5,953	Inquests held	12
General Cases	15,941	Search warrants	72

Parking Law

(Chap. 90 Sec. 20A, Chap. 368 of 1934. Revised Chap. 176, Acts of 1935, Amended Chap. 201 of 1938)

October 1, 1944 to September 30, 1945

Tags issued to police	82,550
Tags turned in (as issued by police to violators)	80,550
Total cash paid in tag office	$27,726

The Other District Courts

In addition to the Municipal Court of the City of Boston there are seventy-two other district courts in different parts of the Commonwealth. Each has one standing justice and from one to three special justices, the number varying with different courts.

The statistical table showing the business of all these 72 courts, prepared by the Administrative Committee of the District Courts, will be found facing page 9. Practitioners in District Courts should examine Appendix E, pp. 71 of the 19th. Report and Appendix B of this Report. There are ten trial justices. Their business will be found on page 83.

Boston Juvenile Court

The Boston Juvenile Court, created in 1906, is a separate court with jurisdiction in juvenile cases in the central district of Boston. It has one judge and two special justices.

Entries for the Year Ending September 30,	*1942*	*1943*	*1944*	*1945*
Delinquent	498	755	813	788
Juvenile Criminal	4	18	9	7
Wayward	3	2	2	0
Neglected	69	97	73	105
Adult Criminal	12	9	43	47
Total	586	881	940	947
Active probationers as of Sept. 30	236	265	213	286

In connection with these figures, it should be remembered that in most cases the boy is placed on probation or otherwise kept under supervision by the court through the probation officer over a long probation period, and that in addition to the "cases" of new complaints entered on the docket and reported in the annual returns to the Department of Correction, the advice and assistance of the judge and probation officers is constantly sought by parents in informal conferences in cases which do not reach the stage of formal complaint by any one.

The Industrial Accident Board

January 1, 1944 to December 31, 1944

Of the 390,293 accident reports filed with the Department during the year 1944, 62,558 were for injuries causing the loss of at least one day or one shift, called in the report of the Department "tabulatable injuries"; of these, 218 cases resulted in death, 35 in permanent total disability, 1,310 in permanent partial disability, and about 57.3 per cent represent a temporary disability of more than one week.

A total amount of $11,858,346.87 was paid out in compensation and medical benefits under the Workmen's Compensation Act. Insurers paid out $10,673,948.94; self insurers paid out $857,061.28; and the governmental units which have accepted the provisions of the Act paid out $327,335.65. The cost of the Commonwealth to administer the law for this year was $319,472.99.

Appellate Tax Board

The Appellate Tax Board is an administrative tribunal, to which have been transferred some of the functions formerly imposed on the Superior Court. It came into existence under St. 1937, c. 400, on May 29, 1937, succeeding the old Board of Tax Appeals which was abolished.

The annual business of this board and its predecessor from 1931 to 1942 will be found on page 91 of the 18th. Report. The figures since the reorganization in 1937 are as follows:

SUMMARY OF REAL ESTATE TAX APPEALS SINCE BOARD WAS REORGANIZED IN 1937
COMBINED FORMAL AND INFORMAL PROCEDURES

THE STATE (*taken as a whole*)	1937	1938	1939	1940	1941	1942	1943*	1944	1945
Appeals pending at beginning of year	6,078	7,746	9,702	10,894	11,998	9,768	7,979	10,219	10,021
Appeals entered (net) during year	5,775	6,400	7,134	8,210	8,798	7,188	7,703	6,978	6,734
Total number before Board during year	11,853	14,146	16,836	19,104	20,796	16,956	15,682	17,197	16,755
Less:									
Settled or withdrawn during year	3,433	3,520	4,749	5,647	9,095	7,024	4,381	5,985	4,082
Net total to be decided by Board	8,420	10,626	12,087	13,457	11,701	9,932	11,301	11,212	12,673
Appeals decided by Board during year	674	924	1,193	1,459	1,933	1,953	1,082	1,191	596
Appeals pending at end of year	7,746	9,702	10,894	11,998	9,768	7,979	10,219	10,021	12,077
BOSTON									
Appeals pending at beginning of year	4,372	5,307	7,055	8,191	9,085	7,776	6,433	7,902	8,144
Appeals entered (net) during year	3,697	4,177	4,675	5,101	5,836	4,982	5,442	5,194	5,245
Total number before Board during year	8,069	9,484	11,730	13,292	14,921	12,758	11,875	13,096	13,389
Less:									
Settled or withdrawn during year	2,460	2,048	2,891	3,312	5,826	4,780	3,137	4,110	2,733
Net total to be decided by Board	5,609	7,436	8,839	9,980	9,095	7,978	8,738	8,986	10,656
Appeals decided by Board during year	302	381	648	895	1,319	1,545	836	840	437
Appeals pending at end of year	5,307	7,055	8,191	9,085	7,776	6,433	7,902	8,146	10,219
OUTSIDE									
Appeals pending at beginning of year	1,706	2,439	2,647	2,703	2,913	1,992	1,546	2,317	1,877
Appeals entered (net) during year	2,078	2,223	2,459	3,109	2,962	2,206	2,261	1,784	1,489
Total number before Board during year	3,784	4,662	5,106	5,812	5,875	4,198	3,807	4,101	3,366
Less:									
Settled or withdrawn during year	973	1,472	1,858	2,335	3,269	2,244	1,244	1,875	1,349
Net total to be decided by Board	2,811	3,190	3,248	3,477	2,606	1,954	2,563	2,226	2,017
Appeals decided by Board during year	372	543	545	564	614	408	246	351	159
Appeals pending at end of year	2,439	2,647	2,703	2,913	1,992	1,546	2,317	1,875	1,858

*Fiscal year 1943 covered only 7 months (Acts of 1941, Chap. 509).

*Fiscal year 1943 covered only 7 months (Acts of 1941, Chap. 509).

STATISTICAL COMPILATION OF WORK OF TRIAL JUSTICES

October 1, 1944 to October 1, 1945

(Compiled by the Administrative Committee of the District Courts)

Trial Justice at	Criminal Cases Begun	Criminal Appeals	Drunkenness	Automobile Cases	Op. under Influence	Juvenile Cases Under 17 Years
Andover	0	0	0	0	0	0
North Andover	19	0	8	6	2	0
Barre	35	9	3	2	0	2
Hardwick	28	1	13	15	2	0
Hopkinton	1	0	1	0	0	0
Hudson	72	2	56	5	0	0
Ludlow	155	2	39	82	0	0
Marblehead*	—	—	—	—	—	—
Nahant	110	0	28	79	16	10
Saugus	78	2	18	24	0	3

* We have been unable to obtain any record from the Trial Justice in Marblehead although letters requesting this information have been repeatedly sent.

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CRIMINAL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1945

Counties	CRIMINAL CASES													
	Number remaining at first of year.	Number of Indictments returned.	Number of appeal cases entered.	Appeals withdrawn before sitting following Entry.	Appeals withdrawn after next sitting, under St. 1937, c. 311.	Number of actions on bail bonds for recognizance entered.	Number disposed of in previous years brought forward for redisposition.	Indictments waived.	Number disposed of during year.	Number remaining at end of year.	Number tried during year.	Number awaiting trial at end of year.	Number of days during which a Superior Court judge has sat for trials, hearings or dispositions.	Days District Court judges were called in to sit in Superior Court.
Barnstable	67	50	43	5	0	0	0	0	117	38	24	14	14	0
Berkshire	68	23	34	5	2	1	0	18	59	85	11	79	19	0
Bristol	310	289	237	46	10	63	21	68	89	42	125	20	70	37
Dukes	0	2	0	0	0	0	0	0	2	0	1	0	3	0
Essex	70	28	489	51	10	2	17	77	934	64	173	49	84	15
Franklin	18	21	12	3	2	0	0	2	32	16	6	11	10	0
Hampden	80	71	105	20	6	0	2	26	195	63	50	67	31	0
Hampshire	137	39	28	6	2	0	22	2	95	133	10	43	8	0
Middlesex	471	850	545	26	40	0	57	23	1,690	256	192	217	175	0
Nantucket	0	1	4	1	0	0	1	0	0	2	3	2	3	0
Norfolk	545	299	208	35	30	0	123	28	642	496	78	408	38	26
Plymouth	168	280	139	21	1	0	68	17	508	121	94	3	60	17
Suffolk	0	934	1,987	61	22	16	290	5	3,437	217	647	189	513*	14
Worcester	115	191	181	17	23	0	41	100	587	115	118	104	76	36
Total	2,049	3,078	4,012	297	148	82	642	366	8,387	1,648	1,532	1,206	1,104	145

Note — 3 complaints by District Attorney in Worcester County.

* Three justices sat for nine additional days in Suffolk County in the appellate division for the review of sentences to the state prison under St. 1943 c. 558.

Note — 3 complaints by District Attorney in Worcester County.

* Three justices sat for nine additional days in Suffolk County in the appellate division for the review of sentences to the state prison under St. 1943 c. 558.

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1945

MADE BY THE CLERKS OF COURT TO THE JUDICIAL COUNCIL IN COMPLIANCE WITH ST. 1936, C. 3, § 3

CIVIL CASES

Table 1 — NUMBER UNDISPOSED OF AT BEGINNING OF YEAR, JULY 1, 1944

County	Law								Equity	Divorce and Nullity	Total Jury Cases	Total Non-Jury
	Jury Cases				Non-Jury							
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others				
Barnstable	74	98	33	19	59	1	6	13	25	0	224	79
Berkshire	45	69	23	6	36	5	9	8	129	0	143	58
Bristol	360	1,397	284	43	115	10	48	19	256	0	2,084	192
Dukes	6	2	2	0	7	0	0	0	7	0	10	7
Essex	278	1,083	321	26	64	40	36	3	97	0	1,708	143
Franklin	22	44	8	4	11	1	6	13	35	0	78	31
Hampden	283	1,179	352	104	149	0	10	20	321	3	1,918	179
Hampshire	35	112	31	8	16	1	1	17	32	46	186	35
Middlesex	589	3,844	1,069	91	215	59	67	80	757	1	5,593	421
Nantucket	1	0	1	0	9	0	0	0	1	0	2	9
Norfolk	286	984	341	78	102	19	37	59	192	0	1,689	217
Plymouth	89	299	76	7	49	12	4	14	145	1	471	79
Suffolk	1,385	5,174	3,136	195	846	522	343	293	2,895	2	9,890	2,004
Worcester	388	1,585	529	51	189	98	65	40	289	0	2,553	392
Totals	3,841	15,870	6,206	632	1,867	768	632	579	5,181	53	26,549	3,846
Combined Totals	26,549				3,846							
	Total undisposed of all kinds 35,634											

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1945—*Continued*

CIVIL CASES

Table 2 — Number of New Cases Entered During the Year

County	Original Writs				Removals from District Courts								Equity	Divorce and Nullity	All Others
					By Plaintiff or Order of Ct.				By Defendant						
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others			
Barnstable	43	11	9	1	0	0	0	0	4	4	0	1	4	0	0
Berkshire	27	63	24	9	0	1	0	0	7	14	1	0	51	0	0
Bristol	76	353	93	22	1	0	0	3	70	169	19	13	73	0	0
Dukes	2	1	1	0	0	0	0	0	0	0	0	0	0	0	0
Essex	166	595	216	7	0	0	1	1	81	405	42	13	151	0	25
Franklin	12	28	4	1	0	0	0	0	1	0	0	2	10	0	0
Hampden	103	646	136	56	0	1	0	0	33	120	19	0	115	2	0
Hampshire	9	62	8	0	0	0	0	0	3	15	1	0	5	48	4
Middlesex	252	1,322	417	125	2	0	0	3	80	633	62	33	287	1	0
Nantucket	3	2	—	—	—	0	—	—	—	—	—	—	—	—	—
Norfolk	93	345	117	38	0	3	0	0	32	134	32	7	55	—	0
Plymouth	33	172	29	0	0	4	0	0	16	69	5	0	51	0	21
Suffolk	688	2,843	1,437	179	5	5	3	18	181	68	85	55	712	0	0
Worcester	159	650	250	28	0	3	1	2	51	310	39	3	150	0	2
Total	1,666	7,093	2,741	466	8	17	5	27	559	1,941	305	127	1,664	51	52
Combined Totals	11,966				57				2,932				1,767		
Total removals					2,989										
Grand Total Entries					16,722										

Grand Total Entries	16,722

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1945—*Continued*

CIVIL CASES

Table 3

NUMBER OF TRIALS CASES TRIED

COUNTY	Total Jury Trials	Total Non-Jury Trials Incl. Eq. and Div.	JURY				NON-JURY				Equity	Divorce and Nullity
			Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	16	2	5	11	0	0	2	0	0	0	0	0
Berkshire	18	8	1	14	3	0	5	0	0	1	2	0
Bristol	94	15	9	65	20	0	7	4	1	0	3	0
Dukes	0	0	0	0	0	0	0	0	0	0	0	0
Essex	264	52	39	150	63	3	10	5	4	6	27	0
Franklin	11	2	6	4	0	1	0	0	0	1	1	0
Hampden	234	46	22	177	30	4	10	2	4	5	25	0
Hampshire	15	40	3	9	3	0	1	0	0	0	1	38
Middlesex	391	100	33	256	101	1	27	4	7	3	58	1
Nantucket	0	0	0	0	0	0	0	0	0	0	1	0
Norfolk	60	13	8	32	13	4	5	0	7	1	3	0
Plymouth	63	24	9	43	11	0	2	0	4	3	15	1
Suffolk	609	324	82	270	249	8	52	12	48	24	188	0
Worcester	227	31	26	142	55	4	9	1	3	7	11	0
Total	2,002	657	243	1,173	548	25	130	28	78	51	335	40
Total trials						2,659						

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1945—*Continued*

CIVIL CASES

Table 4 — Number of Jury Verdicts

County	For Plaintiff																		For Defendant					
	Ordered			Not Ordered			Less than $200			$200 to $500			$500 to $1,000			Over $1,000			Ordered			Not Ordered		
	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts
Barnstable	3	0	0	1	10	0	0	2	0	1	5	0	1	1	0	2	2	0	0	1	0	1	0	0
Berkshire	0	0	0	1	11	2	1	2	0	0	2	2	0	0	0	0	7	0	0	0	0	0	3	0
Bristol	0	0	0	8	32	14	1	2	5	4	8	2	1	12	3	2	10	6	1	1	1	1	30	4
Dukes	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Essex	0	0	0	24	42	26	4	10	7	5	21	8	6	16	5	9	25	6	1	3	14	5	49	10
Franklin	1	0	0	5	3	0	2	0	0	0	0	0	2	1	0	2	2	0	0	0	0	1	0	1
Hampden	0	0	0	10	92	10	1	17	1	3	32	2	4	15	2	2	3	5	1	7	7	6	48	7
Hampshire	0	0	0	2	5	0	0	0	0	0	1	0	0	2	0	2	0	0	0	0	0	0	2	2
Middlesex	1	0	0	22	156	48	4	32	21	6	29	8	5	30	6	8	65	13	2	8	21	13	95	36
Nantucket	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Norfolk	1	0	0	4	17	4	0	1	0	0	4	0	0	4	1	5	8	3	5	1	1	2	13	8
Plymouth	0	0	0	6	11	3	1	1	1	1	3	1	0	3	0	4	4	1	1	2	3	0	18	3
Suffolk	3	4	0	45	150	100	4	24	12	4	4	25	16	31	33	24	59	30	6	46	26	28	70	123
Worcester	0	0	0	15	44	18	6	5	6	2	8	3	3	7	3	4	2	6	6	7	10	1	22	8
Totals	9	4	0	143	573	225	24	96	53	26	117	51	38	122	53	64	187	70	23	76	83	58	350	202
							Total for Plaintiff 901												Total for Defendant 792					

Total for Plaintiff 901

Total for Defendant 792

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1945—*Continued*

County	CIVIL CASES														
	Table 5 — NUMBER OF NON-JURY FINDINGS														
	Findings for Plaintiff												Findings for Defendant		
	Less than $200			$200 to $500			$500 to $1,000			Over $1,000					
	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts
Barnstable	1	0	0	1	0	0	0	0	0	0	0	0	0	0	0
Berkshire	0	0	0	0	0	0	2	0	0	1	0	0	2	0	0
Bristol	1	0	1	0	0	0	0	0	0	3	4	0	3	0	0
Dukes	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Essex	3	2	1	2	2	1	1	0	0	1	0	0	2	0	1
Franklin	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Hampden	4	1	1	3	0	0	0	0	0	0	0	1	3	1	2
Hampshire	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Middlesex	2	2	3	3	1	1	4	0	0	6	1	2	8	2	5
Nantucket	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Norfolk	1	0	1	1	0	6	2	0	0	0	0	0	1	0	0
Plymouth	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
Suffolk	4	2	8	6	6	7	7	0	3	13	1	7	22	3	23
Worcester	2	0	1	4	0	0	2	0	1	1	0	1	3	0	0
Total	19	7	17	20	9	15	18	0	4	25	6	11	44	6	32
Combined Totals	43			44			22			42			82		
	151												82		

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1945—*Continued*

CIVIL CASES

Table 6 — FINALLY DISPOSED OF

COUNTY	JURY								NON-JURY								Equity	Div. and Nul.
	ON AUDITOR'S REPORT				OTHERWISE				ON AUDITOR'S REPORT				OTHERWISE					
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	0	0	0	0	27	27	10	3	0	0	0	0	17	0	2	4	6	0
Berkshire	3	0	0	0	9	67	25	4	2	0	0	0	16	3	5	2	43	0
Bristol	1	0	0	0	131	469	103	7	1	0	0	0	43	7	12	7	94	0
Dukes	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	0
Essex	0	0	0	0	236	851	272	31	0	0	0	0	63	24	24	16	142	0
Franklin	0	0	0	0	24	30	6	2	0	0	0	0	6	1	2	15	34	0
Hampden	0	0	0	0	143	735	212	57	0	0	0	0	62	8	5	13	139	3
Hampshire	0	0	0	0	14	91	13	1	0	0	0	0	7	1	0	4	10	33
Middlesex	0	0	0	0	292	2,050	618	40	0	0	0	0	98	17	32	45	286	0
Nantucket	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0
Norfolk	0	0	0	0	86	402	129	43	0	0	0	0	36	17	10	24	69	0
Plymouth	1	0	0	0	43	168	36	3	1	0	1	0	23	4	12	9	53	1
Suffolk	0	0	0	0	938	3,358	2,052	88	0	0	0	0	402	77	100	101	2,068	0
Worcester	4	3	3	0	169	738	254	19	2	0	2	0	93	45	21	12	152	0
Total	9	3	3	0	2,113	8,986	3,730	298	6	0	3	0	867	204	225	252	3,097	37
Combined Totals	15				15,127				9				1,548				3,097	37

Total disposed of all kinds—19,833

Total disposed of all kinds—19,833

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1945—*Continued*

CIVIL CASES

Table 7 — Cases Triable i. e. at Issue and Awaiting Trial and not Marked Inactive

County	Jury				Non-Jury				Triable but Enjoined				Equity	Divorce and Nullity
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	42	52	17	16	22	1	3	6	0	0	0	0	10	0
Berkshire	28	66	13	3	14	5	6	1	2	0	0	0	16	0
Bristol	213	1028	200	31	30	4	25	15	1	1	0	0	44	0
Dukes	3	2	2	0	5	0	0	0	0	0	0	0	6	0
Essex	192	1,119	266	18	51	42	30	11	0	29	0	0	60	0
Franklin	6	40	6	1	9	1	4	1	0	0	0	0	8	0
Hampden	150	970	189	77	83	0	2	23	0	7	0	0	172	1
Hampshire	5	68	16	0	2	2	1	5	0	0	0	0	4	33
Middlesex	388	3048	697	42	127	33	22	23	2	314	13	15	158	0
Nantucket	8	0	0	0	0	0	0	0	0	0	1	0	0	0
Norfolk	186	730	252	22	50	25	25	39	3	15	0	0	79	0
Plymouth	33	198	35	4	21	4	4	7	0	0	0	0	37	1
Suffolk	784	3,101	1,769	35	241	143	97	85	0	6	3	0	238	1
Worcester	242	1,374	397	19	49	45	28	18	1	41	1	0	88	0
Totals	2,280	11,796	3,859	268	704	305	247	234	9	413	18	15	920	36
Combined Totals	18,203				1,490				455				920	36

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1945—*Continued*

County	CIVIL CASES									
	Table 8 — Cases Remaining Undisposed of Including Cases Marked Inactive									
	Jury				Non-Jury				Equity	Divorce and Nullity
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	72	85	30	17	64	2	6	10	23	0
Berkshire	51	74	17	7	34	7	10	10	137	0
Bristol	350	1436	290	48	96	19	39	38	235	0
Dukes	6	2	2	0	7	0	0	0	7	0
Essex	219	1,135	290	21	72	45	34	17	175	0
Franklin	6	41	6	2	10	1	4	1	11	0
Hampden	236	1,196	292	82	127	7	8	28	297	2
Hampshire	29	96	26	7	13	2	2	17	27	61
Middlesex	531	3,831	892	65	235	50	58	92	758	2
Nantucket	9	0	1	0	6	0	1	0	0	0
Norfolk	295	1,046	347	58	93	28	38	61	184	0
Plymouth	69	379	55	6	55	16	7	13	143	0
Suffolk	1,154	5,245	2,559	154	611	552	292	317	1,539	2
Worcester	367	1,788	537	47	152	83	67	48	289	0
Totals	3,394	16,354	5,344	514	1,575	812	566	652	3,825	67
Combined Totals 33,103	25,606				3,605				3,825	67
	Total undisposed of, all kinds—33,103									

Total undisposed of, all kinds—33,103

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1945—*Continued*

CIVIL CASES

Table 9 — Cases Marked Inactive in Previous Years

County	Jury				Non-Jury				Equity	Divorce and Nullity
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	6	21	11	0	7	0	3	2	9	0
Berkshire	4	1	0	0	7	0	2	6	14	0
Bristol	90	102	46	5	36	2	4	4	68	0
Dukes	2	0	2	0	2	0	0	0	1	0
Essex	0	0	0	0	0	0	1	0	0	0
Franklin	4	4	0	0	3	0	0	0	8	0
Hampden	65	148	80	19	35	0	2	1	90	0
Hampshire	9	14	6	7	7	0	1	6	10	3
Middlesex	54	179	65	7	56	7	13	36	310	0
Nantucket	0	0	1	0	6	0	0	0	0	0
Norfolk	76	141	78	38	21	1	5	8	52	0
Plymouth	21	21	14	0	13	2	2	3	36	0
Suffolk	54	102	91	1	95	108	114	80	45	0
Worcester	59	76	69	14	65	27	20	7	95	0
Totals	444	809	463	91	353	147	167	153	738	3
Combined Totals	1,807				820				738	3

Total of all kinds marked inactive in previous years—3,368

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1945—*Continued*

County	CIVIL CASES									
	Table 10 — Cases Marked Inactive During the Year									
	Jury				Non-Jury				Equity	Divorce and Nullity
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	12	11	2	1	19	0	0	2	1	0
Berkshire	7	3	1	1	5	0	2	3	23	0
Bristol	34	87	37	2	14	2	6	0	39	0
Dukes	0	0	0	0	0	0	0	0	0	0
Essex	1	6	3	2	3	0	1	0	28	0
Franklin	0	0	2	1	0	0	0	0	0	0
Hampden	14	61	20	4	9	0	4	4	30	1
Hampshire	11	8	3	0	0	0	0	3	4	3
Middlesex	77	228	73	8	30	9	7	11	110	0
Nantucket	0	0	0	0	0	0	0	0	0	0
Norfolk	35	158	23	10	12	0	4	7	29	0
Plymouth	6	27	0	1	12	4	1	2	20	0
Suffolk	33	183	73	10	67	43	24	41	106	0
Worcester	26	112	32	4	18	20	15	6	30	0
Total	256	884	269	44	189	78	64	79	00	0
Combined Totals	1,453				410				420	4
	Total marked inactive of all kinds—2,287									

Total marked inactive of all kinds—2,287

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1945—*Continued*

COUNTY	CIVIL CASES										Table 12	
	Table 11 — Inactive Cases Dismissed During Year										Number of Days in which Court Sat	
	Jury				Non-Jury				Equity	Divorce and Nullity	Jury	Non-Jury Including Equity and Motion and Pre-Trial Sessions
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others				
Barnstable	7	1	1	0	2	0	1	1	2	0	12	2
Berkshire	0	2	0	0	2	0	0	0	8	0	1	9
Bristol	30	44	15	3	15	1	3	1	32	0	124	25
Dukes	0	0	0	0	0	0	0	0	0	0	3	0
Essex	0	0	0	0	0	0	0	0	0	0	266	84*
Franklin	2	2	1	2	2	0	1	1	3	0	11	9
Hampden	30	44	23	8	23	0	3	2	45	1	198	79
Hampshire	7	12	7	1	3	0	0	0	8	0	31	9
Middlesex	30	153	30	2	20	1	15	7	94	0	474	184
Nantucket	0	0	0	0	0	0	0	0	0	0	0	3
Norfolk	15	55	22	5	13	0	3	5	24	0	121	14
Plymouth	9	7	5	0	6	0	0	1	20	0	79	27
Suffolk	30	67	50	8	111	50	64	66	34	0	1,044	638**
Worcester	13	26	23	6	52	9	8	1	38	0	222	97
Totals	173	413	177	35	249	61	98	85	308	1	2,586	1,180
Combined Totals	798				493				308	1	3,766 days	

Total dismissed all kinds—1,600

*20 days pre-trial in Essex.

**The 836 days without juries in Suffolk (See Table 12) include 351 days for trials of actions at law in which a jury was waived, and hearings on the merits in Equity cases, 300 days in the Equity Motion Session and 185 days in the pre-trial session.

MUNICIPAL COURT OF THE CITY OF BOSTON FOR CIVIL BUSINESS

Summary, 1944

	Actions Entered—Total	Actions Removed to Superior Civil Court—Total	Actions Defaulted	Ints. Filed		Marked for		Trial List				Findings		Appellate Division										
				To Plaintiff	To Defendant	Motion List	Trial List	Non-Suits	Defaults	Tried	Reserved	For Plaintiff	For Defendant	Requests for Report	Reports Allowed	Reports Dis-Allowed	Petitions to Establish	Reports Proved	Cases Heard	Cases Decided	Affirmed	Reversed	Modified	Entire Re-Trial Ordered	Partial Re-Trial Ordered
Contract	8,122	167	4,719	156	587	—	—	—	—	544	257	459	118	46	12	6	2	—	12	13	13	—	—	—	—
Tort	3,204	301	247	1,721	863	—	—	—	—	548	434	314	242	14	9	4	3	—	11	9	7	2	—	—	—
Contract or Tort	264	9	27	50	37	—	—	—	—	52	49	—	18	4	3	—	—	—	1	3	3	—	—	—	—
All Others	431	1	193	—	5	—	—	—	—	109	22	87	26	—	—	—	—	—	—	—	—	—	—	—	—
Totals	12,021	478	5,186	1,927	1,492	6,005	6,701	129	566	1,253	762	860	404	64	24	10	5	—	24	25	23	2	—	—	—

MUNICIPAL COURT OF THE CITY OF BOSTON FOR CIVIL BUSINESS

SUMMARY, 1944—*Continued*

	Appellate Division—*Con.*							Defendants' Judgments						Plaintiffs' Judgments							
	Motions	Cases Consolidated Under Stat. 1935 C. 483	Appeals to Supreme Judicial Court	Appeals to Supreme Judicial Court—Perfected	Appeals to Supreme Judicial Court—Affirmed	Appeals to Supreme Judicial Court—Reversed	Appeals to Superior Civil Court	Entered by Non-Suit	Entered by Trial—Open Court	Entered by Trial—After Reservation	Entered by Agreement	Total Defendants' Judgments	Neither Party by Agreement	Entered by Default	Entered by Trial—Open Court	Entered by Trial—After Reservation	Entered by Agreement	Total Plaintiffs' Judgments	Amount of Plaintiffs' Judgments	Average Amount of Plaintiffs' Judgments	Executions Issued
Contract	5	—	5	1	3	1	—	14	42	76	37	169	242	4,050	245	214	872	5,381	$865,074.54	$160.76	5,270
Tort	20	46	4	4	6	—	—	64	37	205	45	351	231	1	77	237	1,761	2,076	428,653.68	206.48	417
Contract or Tort	1	—	2	1	2	—	—	3	3	15	—	21	8	—	—	—	—	—	—	—	3
All Others	—	—	—	—	—	—	4	—	14	12	—	26	2	111	73	14	31	229	1.00	—	177
Totals	26	46	11	6	11	1	4	81	96	308	82	567	483	4,162	395	465	2,664	7,686	$1,293,729.22	$168.32	5,867

REPORTS OF REGISTERS OF PROBATE FOR YEAR ENDING DEC. 31, 1944

(Table prepared by the Administrative Committee of the Probate Courts)

	Probate—Decrees																Divorces			Fees Collected				
	Original entries (New Cases)	Administrations Allowed	Wills allowed	Guardians Appointed	Conservators Appointed	Trustees Appointed	Accounts Allowed	Real Estate Sales	Real Estate Mortgages	Real Estate Partitions	Equity Decrees	Separate Support	Desertion and Living Apart	Custody	Other Decrees and Orders Entered	Papers Recorded	Original Entries (New Cases)	Decrees and Orders Entered		Probate	Divorce	Certificates and Copies	Total	Commitment, Insane Feeble Minded
																		Nisi	Others					
Barnstable	426	115	188	29	9	17	368	89	3	2	6	0	0	0	177	1,922	91	69	32	$2,647.45	$465.00	$1,387.70	$4,500.15	1
Berkshire	941	376	248	81	22	32	672	137	7	5	14	22	6	8	421	2,776	252	163	256	5,003.00	1,260.00	2,459.30	8,722.30	2
Bristol	2,095	900	585	192	42	92	713	404	8	12	13	64	30	5	1,369	6,577	936	759	99	10,251.00	4,680.00	5,483.62	20,414.62	9
Dukes	70	34	29	3	2	3	44	12	1	0	0	1	0	0	16	363	8	8	1	459.00	40.00	208.60	707.60	0
Essex	3,479	1,465	940	303	91	290	2,101	536	7	17	47	80	11	20	1,026	9,431	914	595	421	18,226.00	4,565.00	8,938.51	31,729.51	0
Franklin	440	144	115	30	19	11	275	54	2	1	3	3	0	0	149	2,487	94	63	23	2,370.85	470.00	756.50	3,597.35	0
Hampden	1,890	734	421	131	50	68	1,363	291	6	2	4	52	2	21	799	9,918	821	573	317	10,095.35	4,105.00	5,056.40	19,256.75	12
Hampshire	1,807	197	154	30	6	17	353	112	0	0	0	1	1	0	149	2,410	35	27	7	2,900.00	175.00	1,145.85	4,220.85	2
Middlesex	6,152	2,470	1,764	525	130	294	3,022	919	32	12	99	110	12	27	4,144	22,686	1,931	1,210	1,227	34,232.00	9,620.00	20,081.00	63,933.00	26
Nantucket	50	15	25	1	0	1	26	8	0	1	0	0	0	0	12	128	9	8	13	241.50	45.00	57.70	344.20	0
Norfolk	2,625	894	816	217	106	180	2,337	340	7	7	56	58	7	17	1,581	13,107	650	389	569	15,481.45	3,140.00	10,296.15	29,917.60	53
Plymouth	1,410	624	359	105	32	52	830	245	9	16	19	32	3	3	207	5,891	429	303	125	7,648.00	2,140.00	2,808.43	12,596.43	3
Suffolk	5,751	2,371	1,132	524	104	285	4,925	676	20	24	106	243	7	17	6,913	29,082	2,265	1,457	1,511	32,889.00	11,295.00	17,018.29	61,202.29	1,333
Worcester	3,505	1,492	799	429	110	125	2,105	549	11	7	60	152	3	6	2,578	11,245	1,205	668	319	16,112.90	6,025.00	6,008.35	28,146.25	20

APPENDIX F

THE HISTORY OF THE INDETERMINATE SENTENCE AND THE REFORMATORIES FOR MEN AND WOMEN IN MASSACHUETTS

(For reference in connection with H. 58, 66, 67, 68, 368 and Senate 478)

As it is not readily available elsewhere for convenient reference, the story of the statutory development of the "indeterminate" sentence and of the Massachusetts Reformatory (for men) and Reformatory for Women is reprinted from the brief of former Attorney General Benton and Assistant Attorney General York in the case of *Platt* v. *Commonwealth*, 256 Mass. 539 (in 1926) which was sustained by the court in the opinion of Chief Justice Rugg at pages 542–543.

Extract from the Brief

The Issue

Can a female, having been found guilty of a crime with maximum punishment for which is three months' imprisonment, be lawfully sentenced to the Reformatory for Women at Sherborn where she may be held for not more than two years under the "indeterminate sentence" law?

Historical

The first statute of the Commonwealth fixing the penalty for fornication, St. 1785, c. 66 (brought over from the Colonial Laws), provided a penalty of not exceeding five pounds nor less than thirty shillings, in case of a man, with whipping not exceeding ten stripes if it were not paid; and for a fine not exceeding three pounds nor less than six shillings for a woman. If not paid, the statutory penalty was an alternative of imprisonment in a jail or house of correction, not more than ten days nor less than twenty-four hours. Succeeding offences were punished more severely. This law continued in existence until 1836, when by R.S., c. 130, s. 5, imprisonment not exceeding two months was substituted for whipping.

St. 1849, c. 132, s. 3, increased possible imprisonment to three months, which law has not since been changed. G. L., c. 272, s. 18, provides as follows:

> "Whoever commits fornication shall be punished by imprisonment for not more than three months or by a fine of not more than thirty dollars."

Development of the "Indeterminate Sentence" Law

Prior to 1886 the courts, in dealing with a person accused of crime, had five functions, (first) to determine the guilt of the accused, and

if found guilty, (second) to determine all the further proceedings. If the convict was thought to "deserve" imprisonment the court had discretion, (third) to choose the place of confinement, (fourth) to establish its duration, subject to the limits fixed by law in each case, and (fifth) to fix the time when it should terminate.

In 1886 a statute was passed (St. 1886, c. 323, s. 1) which established the "indeterminate sentence," so called, for men sentenced to the Massachusetts Reformatory. The Legislature thereby recognized the fact that no judge could know in advance when a person who had committed a crime would be fit for unrestricted liberty. The effect of this statute was to take from the court the last two functions above mentioned, namely, the fixing of the duration of the imprisonment, possible or actual, and the fixing of the time when restraint by the State should terminate. Accordingly, instead of fixing a maximum for each crime (not more than a stated number of years or months), the statute provided that a prisoner confined in the *Reformatory* might be held not more than two or five years, according to the technical gravity of his offence. At the same time the Legislature made the power to release from imprisonment an administrative act instead of a judicial one and vested it in the Commissioners of Prisons, with large discretion. Appreciating that the Commissioners might make mistakes in the exercise of this power and grant a "permit to be at liberty" to a prisoner who could not or would not continue a good citizen outside the walls of the prison, the holder of such a permit was put under supervision and the Commissioners were empowered to return him to further treatment if necessary.

In 1874 (St. 1874, c. 385) the Reformatory Prison for Women was established as the result of a long agitation which had created a sentiment in favor of dealing with female law breakers in a separate institution, administered solely by women, instead of in fourteen different prisons. The establishing act (St. 1874, c. 385) designated the class of offenders who might be the subjects of treatment by the new method and defined the powers of the court in regard to them. These powers were identical with those possessed by the courts in dealing with those sentenced to houses of correction for the same offences. The court directed the commitment of the convict to the new institution and prescribed the length of the term for which she might be held; the sentence being distinctly *penal*. The Reformatory accordingly took its place among the "prisons" as an addition to those already existing. The word "Reformatory" in its title did not affect its functions as a prison, although it suggested, but did not control, the methods and purposes of its administration. Section 17 provided:

"Any court or trial justice of the Commonwealth having cognizance of an offence

punishable by imprisonment in a jail, house of correction or house of industry, before whom any female may be convicted of such offence, may sentence such female therefor, to the reformatory prison for women."

This gave to municipal, police and district courts and trial justices authority and jurisdiction to sentence women to that institution for any misdemeanor, and gave to the superior court authority and jurisdiction to sentence them for felonies, in both cases for terms of the same length as those for which they might have been sentenced to houses of correction.

Experience soon showed the necessity for a change in the law regarding the *duration* of the imprisonment. In 1881 the first marked step in advance toward changing the character of the institution was taken. Release when reformation was believed to be accomplished was the logical sequence of the legislation which made it possible to impose long sentences for minor misdemeanors. Authority was given to the Commissioners (St. 1881, c. 90) to release upon a revocable "permit-to-be-at-liberty" an inmate who, in their opinion, had reformed. Thenceforth the power to determine the duration of the imprisonment was taken from the court and vested in the Commissioners (the court having fixed the term). Demonstration of fitness to be "at liberty" took the place of a judicial judgment, formed in advance.

The next forward step taken by the Commonwealth toward the improvement of its methods of dealing with offenders was the establishment at Concord in 1884 (St. 1884, c. 255) of a reformatory for young men. Commitments were to be on definite sentences for the same terms (s. 8) (but not less than one year) for which the convicted man might be sent to the State Prison or to a house of correction. Provision was made for releases upon revocable permits (s. 33).

In 1886 this law regarding commitments was changed very radically. The power of the courts to prescribe the term of the sentence was taken away (St. 1886, c. 323). The convict was merely sentenced (s. 1) to the State Reformatory for Men, which was authorized to hold for a term not exceeding two years a person sentenced for drunkenness, or for being a common drunkard, a stubborn child, vagrant tramp, or an idle and disorderly person. A person sentenced for any other offence might be held for not more than five years.

The phraseology has been changed by St. 1892, c. 302, St. 1907, c. 252, and St. 1910, c. 356. It now appears in G.L., c. 279, s. 33, in a form which practically authorizes the holding of an inmate not exceeding five years for a felony, and one committed for a misdemeanor for not exceeding two years, subject to release by the Commissioners.

The Reformatory for Women went on in the old way seven years

longer, all prisoners being committed on definite sentences, until 1903 when the example of the State Reformatory was followed and an act was passed (St. 1903, c. 209) establishing the "indeterminate sentence." This act provided that the courts shall not prescribe the limit of the sentence; that a woman who is sentenced for a felony may be held not more than five years, for a misdemeanor not more than two years. This act is now incorporated into the General Laws in a slightly different form but not changed in substance (G.L., c. 279, ss. 16–20). This legislation took away the power of the courts to prescribe the limit of a sentence to the *Reformatory* and removed all court restrictions upon sentences to that institution, but in no way affected a sentence to a *house of correction*. Accordingly, if a woman was sentenced to a house of correction for fornication, the maximum penalty remained at three months' imprisonment.

Distinction between the Definite Sentence and the Indeterminate Sentence

There are two fundamental differences between the definite and the indeterminate sentence. In the former, the State deals solely with the criminal act which has been committed and punishes it. In the latter, that act is merely the occasion for the imprisonment of the offender. In authorizing, but not requiring, a long imprisonment, the sole thought of the State is the protection of the public by the reformation and restoration of the offender. The most important factor in that problem is the peculiar nature of the work to be done. Comparatively few women commit serious crimes. Among the inmates of the Reformatory an offender against the person or against property is exceptional. Most of the inmates are offenders "against public order and decency," a great majority of them sex offenders with a history of venereal disease, which makes them dangerous to the public. The present case is of this class, for which reason the trial judge undoubtedly sentenced the plaintiff in error to the Reformatory instead of to the House of Correction.

The very long sentence to the reformatory (ordinarily four times what it would have been to a house of correction) does not indicate a judicial estimate of the seriousness of a woman's offence, but rather the great importance of a supreme effort on the part of the State to reclaim her. For the application of the necessary means, moral, mental, physical and industrial training, much time is required.

A sentence without any limit, terminable by release at any time, cannot be in conflict with a statute which limits punishment *elsewhere* to three months. If they were in conflict, it is respectfully submitted that the statute establishing the indeterminate sentence repealed the other (see G.L., c. 279, ss. 17 and 18). In *Moulton* v. *Commonwealth*, 215 Mass. 525, at page 527, this court says:

"If, however, an earlier statute is repugnant to the subsequent act the presumption is, that the latter statute is intended as the final expression of the legislative will, and the former statute is necessarily repealed by implication. *Commonwealth* v. *Wyman*, 12 Cush. 237, 238, 239. See *Copeland* v. *Springfield*, 166 Mass. 498, 504; *Paszkowski* v. *Stony Brook Paper Co.*, 210 Mass. 86, 89."

The statute establishing the Reformatory for Women (St. 1874, c. 385, s. 17, supra) dealt only with the power of the courts to sentence to it.

The Indeterminate Sentence may be Considered as an Alternative Sentence

In the latest revision of the laws of the Commonwealth (General Laws, 1921) the question of the general power of the courts to impose sentence to the Reformatory is ignored. It is assumed that it is included in their general judicial powers.

But a section is inserted dealing with the very question involved in this case. G.L., c. 279, s. 16 provides as follows:

"A female, convicted of a crime punishable by imprisonment in a jail or house of correction, may be sentenced to the reformatory for women."

Being punishable by imprisonment in a house of correction, fornication is one of the crimes for which a woman may be sentenced to the Reformatory for Women. If she is sentenced to a *house of correction* the duration of her imprisonment is governed by G.L., c. 272, s. 18, which provides as follows:

"Whoever commits fornication shall be punished by imprisonment for not more than three months or by a fine of not more than thirty dollars."

But if the court exercises its discretion, as in the case at bar, to send her to the *Reformatory for Women* instead, the duration of her imprisonment is governed by G.L., c. 279, s. 18, which provides as follows:

"A female sentenced to the reformatory for women for larceny or any felony may be held therein for not more than five years, unless she is sentenced for a longer term, in which case she may be held therein for such longer term; if sentenced to said reformatory for any other offence, she may be held therein for not more than two years."

In the latter case the court does not prescribe the limit of the sentence, unless it be for more than five years, by virtue of G.L., c. 279, s. 17, which provides:

"The court or trial justice, imposing a sentence to the reformatory for women, shall not prescribe the limit of the sentence unless it is for more than five years."

G.L., c. 125, s. 30, provides as follows:

"The reformatory for women at Sherborn shall be the prison of the commonwealth where all females convicted of crime in the courts of the commonwealth or of the United States, and duly sentenced or removed thereto, shall be imprisoned and detained in accordance with the sentences or orders of said courts and the rules and regulations of said institution. A department for defective delinquents shall be maintained for the custody of persons committed thereto under sections one hundred and thirteen to one hundred and twenty-four, inclusive, of chapter one hundred and twenty-three."

The Board of Parole is authorized to make rules and regulations for dealing with prisoners in accordance with their behavior and industry. G.L., c. 124, and G.L., c. 127, s. 128, *et seq.* Acting under this authority the Board has established certain rules. Rule 3 of the rules of the Board of Parole provides:

"If he is serving his first term in the reformatory, having been sentenced for a two-year term, he shall on the expiration of eleven months from the date of his commitment to the reformatory, have the right to make an application for a hearing before the Board of Parole on the question of his release."

Under this rule a prisoner in the Reformatory may apply for a hearing on the question of release after serving approximately one-half of the term for which he or she may be held therein for "any other offence" than for larceny or felony (G.L., c. 279, s. 18, supra). Alternative sentences have been in existence for many years.

See *Stevens* v. *Commonwealth*, 4 Met. 360.
Lane v. *Commonwealth*, 161 Mass. 120.

The Reformatory for Women is Distinct from Other Prisons

The history of the Massachusetts Reformatory for Women clearly demonstrates that it is entirely separate and distinct from other "prisons" of the Commonwealth. This is recognized by judicial decision. In *Moulton* v. *Commonwealth*, 215 Mass. 525, at page 527, this court says:

"It is urged by the defendant in error, that the reformatory prison for women must be ranked as synonymous with the State prison, or in other words that it is a branch of the State prison, when the place of punishment of women convicted for felony is under consideration. It is not so denominated in our laws. While subject to the supervision of the prison commissioners, its discipline and management are not only distinctive, but entirely independent of other penal institutions, and it is supported by an annual separate appropriation. It was established by the St. of 1874, c. 385, and by that act as well as in subsequent statutes and revisions the intention of the Legislature to provide a separate place for the detention, punishment and reformation of women convicts is plainly manifest." (Statutes cited.)

The Indeterminate Sentence Statutes are Constitutional

In the case of Sheehan, Petitioner, decided January 7, 1926, Adv. Sh. (1926) 155, at page 156, this court says:

"A statute requiring an indeterminate sentence between a stated maximum and a fixed minimum, the precise time of release to be decided by an executive or administrative board, has been held constitutional. *Commonwealth* v. *Brown*, 167 Mass. 144, 146. G. L., c. 278, s. 24. *Oliver* v. *Oliver*, 169 Mass. 592; *State* v. *Page*, 60 Kan. 664; *In re* Marlow, 75 N.J.L. 400." (and other citations).

Note to Page 57

THE DRAFT AS TO NOTICE TO ADMIT FACTS SUGGESTED IN THE FIRST REPORT OF THE JUDICIAL COUNCIL (*referred to on p. 57 of this Report*) WAS AS FOLLOWS:

"Section 69. In any action at law or suit in equity a party may by notice in writing filed in court and served on the other party not less than ten days before the trial of the action or suit call upon the other party to admit for the purposes of the case only any specific fact or facts or the execution of any paper or papers; and if no answer is filed within six days after service of such notice or within such further time as the court may on motion allow the truth of the fact or facts of the execution of the paper or papers shall for the purposes of the case be taken as admitted. If the party upon whom such notice is served refuses to admit any fact or the execution of any paper mentioned in the notice, the reasonable expense, including counsel fees, of proving such fact or the execution of such paper, as determined after summary hearing by the justice presiding at the trial, shall be paid by said party to the other party unless the justice certifies that the refusal to admit was reasonable and the amount thereof shall be added to the taxable costs of the party in whose favor such amount is awarded or deducted from any judgment or decree against him."

Compare Federal Rule 36.

Compare also the following:

Order XXXII, Rules 2 and 4 of the English Practice

Order XXXII, Rule 2. "Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to

give the notice is, in the opinion of the taxing officer, a saving of expense."

Rule 4. "Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion or in favor of any person other than the party giving the notice; provided also, that the court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just."